Spring Issue
MARCH 1958

AAUP BULLETIN

VOLUME 44 NUMBER 1

Academic Freedom and Tenure

NINE REPORTS

The University of Vermont
New York University
The University of Michigan
Reed College
Dickinson College
The University of Southern California
Alabama Polytechnic Institute
Texas Technological College
Livingstone College

A PUBLICATION OF THE

American Association of University Professors

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AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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Contents

Foreword

Nine reports of investigating committees of the American Association of University Professors are here presented. The first four, which deal with the dismissal of faculty members at the University of Vermont, New York University, the University of Michigan, and Reed College, are supplementary to the report of the Special Committee, which was published in the Spring, 1956 issue of the *AAUP Bulletin* under the title "Academic Freedom and Tenure in the Quest for National Security." This report was considered and acted upon at the Association's Annual Meeting in April, 1956, at St. Louis. The Special Committee found that it was unable, on the basis of information available to it, to state conclusions concerning these four dismissal cases, and it suggested that the Association appoint committees to conduct further investigations and make full reports on these cases. This has now been done.

Two of the reports deal with dismissals at Dickinson College and the University of Southern California which were not considered by the Special Committee. However, in each a teacher who had refused to answer questions at a hearing conducted by the Un-American Activities Committee of the United States House of Representatives was subsequently dismissed from his academic post. Thus both of these reports can be thought of as further efforts by the Association to evaluate the impact of "the quest for national security" on academic freedom and tenure.

The report on Alabama Polytechnic Institute deals with the first case in which the Association has been asked to investigate the dismissal of a teacher because of his views on the issue of racial desegregation.

The reports on Texas Technological College and Livingstone College examine actions by boards of trustees which were alleged to be grossly arbitrary and improper.

Each of these nine reports is the result of an investigation conducted by the individuals over whose names the report appears. The text of the report was written in the first instance by these persons. However, in accordance with Association practice, the reports were submitted for careful consideration to (a) the Association's standing Committee on Academic Freedom and Tenure (Committee A), (b) the teacher or teachers in whose interest the investigation was conducted, (c) the administrative officers and trustees of the college or university in question,

and (d) the officers of the Association's chapter at that institution. In almost every instance, suggestions for change were received from some or all of these persons and, in the light of these suggestions, the report has been revised before being published. Thus it is not to be expected that each member of an investigating committee would personally put every statement in a report just as it appears here. However, each report does represent a general consensus of the members of the investigating committee; it has their approval; and it has also been approved for publication by Committee A.

In further accordance with Association practice, Committee A may, if it chooses, submit recommendations for action on or the disposition of each case to the Annual Meeting of the American Association of University Professors at Denver, Colorado, in April, 1958.

A Statement of the Committee on Academic Freedom and Tenure

Supplementary to the 1956 Report, "Academic Freedom and Tenure in the Quest for National Security"

Recent decisions of the United States Supreme Court, recognizing the validity of legally-based assertions of the right to remain silent under a variety of circumstances, or declaring the invalidity of official action adverse to an individual because of his refusal to yield information about his possible Communist connections, go far to justify the position taken by the Association's Special Committee on these matters in its report, "Academic Freedom and Tenure in the Quest for National Security," which was published in the Spring, 1956 issue of the *AAUP Bulletin* and was approved by the Association's Council and Forty-second Annual Meeting. Some of these involve situations closely analogous to academic dismissal proceedings.[1]

Several of the reports of investigating committees, herewith published, deal with cases in which dismissed faculty members followed their refusals to answer questions before Congressional committees with refusals to make disclosures to representatives of their own institutions, when their previous conduct gave rise to questions. These cases may be visualized as falling into a spectrum extending from a complete refusal to discuss questions dealing with political or social views or associations, to the most complete willingness to answer all such questions even in a formal, open hearing. At one end of the spectrum, that of complete refusal to answer questions of this type on the claim of principle, is found the case of Professor Stanley Moore at Reed College. To this may be added the case of Professor Horace B. Davis at the University of Kansas City, already published in the *AAUP Bulletin* (April, 1957 Supplement) but not yet acted upon by the Association. Farther down the spectrum is the stand of Professor L. R. LaVallee at Dickinson College, who seems to have answered questions relating to previous

[1] See, in particular, *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *State of New Hampshire*, 354 U. S. 234 (1957); *Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1957).

political associations in certain private conferences but bluntly refused to answer similar questions in his hearing. Two cases fall near the middle of the spectrum. One is the case of Dr. H. Chandler Davis at the University of Michigan, who answered some questions relating to his integrity, but declined to answer questions directed toward his political views. The other is that of Associate Professor Edwin Berry Burgum, at New York University, who in his hearing denied any corrupting influence of his alleged Communist connections, any advocacy of violent overthrow of the government, or any dictation of his views by an outside source; but who nevertheless refused to answer certain other questions regarding his political views and activities, and in particular concerning his possible engagement in recruiting students into the Communist Party. Farther toward the end marked by compliance with questioning is the special case of Professor Alex B. Novikoff, at the University of Vermont. Professor Novikoff answered frankly all questions relating to the period dating from his appointment to the University, but he refused to discuss questions directed at certain associations alleged to have existed in earlier years. Yet ultimately he offered to answer even these questions if his testimony could be made off the record in private instead of public hearing, an offer which the board of hearing did not see fit to accept. Finally, at the extreme of the spectrum, is the case of Associate Professor Mark Nickerson, at the University of Michigan. Professor Nickerson undertook to answer all questions directed to him.

It may be further noted that in the case of Mr. Andries Deinum, at the University of Southern California, no opportunity at all was given him to answer questions or charges or to have a hearing. In the early case of Associate Professor Lyman Bradley, at New York University, there was, on the other hand, a hearing on charges, but refusal to answer, or lack of candor toward college authorities, did not become an issue. These cases may be regarded as extending the two ends of the spectrum into the invisible.

Each report here published expresses the judgment of its authors upon the situation presented, when judged in the light of Association principles still undergoing refinement and application. Committee A has been charged with the function of elaborating those principles on the basis of further thought and of the experience reflected in these reports. It is first desirable to restate pertinent passages from the 1956 Report of the Special Committee, as follows:

The administrations of colleges and universities should, of course, take note of indications of the possible unfitness of faculty members. If a faculty member invokes the Fifth Amendment when questioned about Communism, or if there are other indications of past or present Com-

munist associations or activities, his institution cannot ignore the possible significance for itself of these matters. There is then a possibility of his involvement in activities subversive of education itself, or otherwise indicative, to an important degree, of his unfitness to teach. As in other instances of possible unfitness, preliminary inquiry into this possibility is warranted and can become a duty. The aid of other faculty members may be sought in such an inquiry; but the inquiry should be confidential in so far as possible, and should not be substituted for the hearing to which the faculty member has a right if formal charges are brought against him. If, after consideration of a faculty member's whole career, as well as the circumstances surrounding his invocation of the Fifth Amendment, probable cause to believe that he may be unfit is not disclosed, the matter should end at this stage; but if probable cause for belief in his unfitness is shown, charges leading to a formal hearing should be brought.

. . . [T]he invocation of the Fifth Amendment by a faculty member under official investigation cannot be in itself a sufficient ground for removing him. The Amendment's protection is a constitutional privilege. The exercise of one's constitutional privilege against self-incrimination does not necessarily or commonly justify an inference of criminal guilt; and even if it were to be ruled otherwise, it would not follow that the loss of an academic position should automatically result from a legal offense, whether proved in court or established by inference, without consideration of the relation of the offense to professional fitness. Invocation of the Fifth Amendment is to be weighed with an individual's other actions in passing a judgment on him. The same may be said with regard to refusals to testify on other grounds, such as the assertion of a right of silence thought to be conferred by the free-speech provision of the First Amendment, or because of a claim of lack of authority in the investigating body, an unwillingness to inform upon other persons, or a reluctance to cooperate in an investigation deemed oppressive or dangerous to the public interest.

The fact that a faculty member has refused to disclose information to his own institution is relevant to the question of fitness to teach, but not decisive. If the refusal appears to be based upon evasiveness and a desire to withhold evidence of illegal conduct which would disqualify him as a member of the faculty, the refusal would be a weighty adverse factor. On the other hand, a refusal to answer questions which arises from a sincere belief that a teacher is entitled to withhold even from his own institution his political and social views should be accorded respect and should be weighed with other factors in the determination of his fitness to teach. Nevertheless, members of the teaching profession should recognize that sincerity cannot be judged objectively and that a college or university is entitled to know the facts with which it must deal. This is especially true when a faculty member's activities, whether or not they are blameworthy, have resulted in publicity hurtful to his institution. Accordingly, in any proper inquiry by his institution, it is the duty of a faculty member to disclose facts concerning himself that are of legitimate concern to the institution. . . . This obligation diminishes if the institution has announced a rigid policy of dismissal in such a way as to prejudge the case.

We are aware that statements made by a faculty member to his institution are not legally privileged and that his interrogators may be compelled in a later official proceeding to testify that he made them. If such statements tend to incriminate him, he may in effect lose the protection of the Fifth Amendment. But we believe that the institution's right to know facts relevant to fitness to teach should prevail over this consideration.

. . . Removal can be justified only on the ground, established by evidence, of unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation in conspiracy against the government. The same principle applies, *a fortiori*, to alleged involvement in Communist-inspired activities or views.

II

The most urgent need for elaboration of the principles enunciated in 1956 concerns the relative weight that may properly, in the context of all other pertinent considerations, be given, in reaching a final decision, to the reasons for the faculty member's continued refusal to make disclosures to his own institution. As the 1956 report recognizes, such refusal, in itself, may not be discreditable to the faculty member if it is based on honest adherence to principle—for example, a principle of freedom, or belief in the right of privacy—even if others disagree with his view. This is true even where such silence may follow a refusal on Fifth Amendment or other grounds to testify before a Congressional committee or other governmental agency. On the other hand, the faculty member's continued silence may reflect unfavorably upon him if his purpose is to conceal derogatory information he knows to be pertinent to the question of fitness.

The assertion by a faculty member of the right to withhold from his institution information which is pertinent to his fitness casts upon him the burden of explaining his refusal. Following such an explanation, the responsible tribunal or authorities may find it necessary to determine, as one element in gauging his fitness to continue as a teacher, what his actual reasons for silence are, even though this will not always be an easy determination to make.

Even if the tribunal finds that the faculty member's reasons for silence are discreditable to him, this adverse factor must be judged in the context of all the other available evidence as to his professional fitness, for here, as in all other aspects of dismissal proceedings, the deciding tribunal or authority is always under a duty to reach a just conclusion in the light of the faculty member's full record. The tribunal also has an obligation to state the reasoning that lies back of its decision in a manner that will show the considerations that have affected the decision and how they have been balanced. On his part, the faculty member who persists in silence within his own institution must remember

that, although the burden of proof rests on those who are bringing charges against him, his withholding of information sought by his institution may well leave unchallenged other evidence tending to show him unfit. To put it somewhat differently, the institution may properly concern itself with the facts falling within the area of the teacher's silence as they bear upon the issue of his fitness, and arrive at a judgment concerning them.

The faculty member may find himself facing another dilemma. He may run the risk of losing the protection of the Fifth Amendment if he answers questions in a public hearing and on the record, or, conversely, of being misjudged if he remains silent. If, in such straits, he offers to answer privately, and off the record, questions he has previously refused to answer, the tribunal should either accept the offer or recognize that the offer is in itself some evidence of candor and sincerity on the part of the teacher. Such private, off-the-record testimony would not, in this committee's judgment, violate the requirement of the 1940 Statement of Principles on Academic Freedom and Tenure that "There should be a full stenographic record of the hearing available to the parties concerned." It is well to remember that a dismissal proceeding is not bound by strict legal rules, and that the aim of the tribunal is to arrive, by all fair means, at the fullest truth relevant to the charges. Off-the-record testimony is properly regarded with suspicion and therefore generally forbidden in academic dismissal proceedings, particularly for witnesses testifying against the accused faculty member. But its limited use for good cause by the faculty member, who enjoys the benefit of the doubt in the proceeding and on whom the duty of candor is being urged, may well enable the tribunal to reach a fair and just decision. In explaining its decision, it may, of course, draw inferences, whether favorable or unfavorable, from such off-the-record testimony, even though the testimony itself may not be disclosed.

If the tribunal refuses to accept an honorable reason offered by a faculty member in justification of his nondisclosure, there being no rational basis in the record for this refusal, and he is then dismissed solely because of this silence, the action is censurable because a sufficient ground for dismissal has not been established. If, on the other hand, a decision to dismiss is found to have been reached fairly and to be supportable on the record when judged by the foregoing considerations, the Association is not entitled to dispute it.

III

Further comment should be made concerning the statement in the 1956 Report that the "obligation [of a faculty member to disclose facts concerning himself that are of legitimate concern to his institution]

diminishes if the institution has announced a rigid policy of dismissal in such a way as to prejudge the case." The objection here is not to the fact that an institution may wish to enumerate in a general statement justifiable grounds for the removal of members of its faculty, such as those found in the 1956 Report of the Special Committee, for it is often desirable that conduct deemed to be improper should be defined in advance. Where, however, a rigid policy, in effect predetermining the question of fitness, is based on inadequate grounds, such as invocation of the Fifth Amendment or the simple fact of membership in an organization, the faculty member may be justified in refusing to become party to an intramural form of self-incrimination.

Bentley Glass (Biology), The Johns Hopkins University, *Chairman*

Members: Robert L. Calhoun (Theology), Yale University; Robert K. Carr (Political Science), Dartmouth College and Washington Office; William P. Fidler (English), Washington Office; Ralph F. Fuchs (Law), Indiana University; Charles T. McCormick (Law), University of Texas; Douglas B. Maggs (Constitutional Law), Duke University; Walter P. Metzger (History), Columbia University; Warren C. Middleton (Psychology), Washington Office; Glenn R. Morrow (Philosophy), University of Pennsylvania; George Pope Shannon (English), Washington Office; Warren Taylor (English), Oberlin College; George C. Wheeler (Biology), University of North Dakota; Helen C. White (English), University of Wisconsin, *ex officio*.

The University of Vermont

This report constitutes an addendum to the section on the University of Vermont in a report by a special committee of the American Association of University Professors, published under the title, "Academic Freedom and Tenure in the Quest for National Security," in the *Bulletin* for Spring, 1956, pp. 49 and 83–85. This report will hereafter be referred to as "the original report."

The undersigned, appointed to make a supplementary investigation and report,[1] visited the University of Vermont at Burlington on November 19 and 20, 1956. Its members interviewed as many as possible of the participants in the events which had led to the discharge of Alex B. Novikoff, Professor of Experimental Pathology and Associate Professor of Biochemistry, in September, 1953. The persons interviewed included faculty members and trustees who had served in the two inquiries or had been otherwise involved; witnesses at the two inquiries conducted in connection with the dismissal; the President of the University; and the attorneys for the Administration and for Dr. Novikoff. Dr. Novikoff was unable to be present, and was not interviewed. All available documents connected with the case were studied. The inquiry was facilitated by the friendly and cooperative way in which the committee was received by everybody at the University.

The facts stated in the original report were found to be correct. However, some explanation of those facts, together with some new facts, is needed to make clear how a widespread desire to maintain academic freedom and tenure may become procedurally so entangled as to lead to general frustration and a miscarriage of justice.

The body of the original report is here reprinted in full:

University of Vermont

[1] On April 23, 1953, an associate professor of biochemistry at the University of Vermont, with tenure, having been called to testify before a subcommittee of the United States Senate Judiciary Committee, claimed the privilege of the Fifth Amendment. In accordance with the announced policy of the University, he was immediately relieved of his teaching duties; and a Faculty-Trustee committee was appointed to make a preliminary inquiry into the case. This committee consisted of 3 trustees and 3 faculty members. It met in executive session, but a

[1] *Bulletin*, Summer, 1956, p. 379.

stenographic transcript was prepared and later released. The committee voted 5 to 1 that the faculty member be retained. The dissenting member, a trustee, joined in the conclusion regarding the fitness of the faculty member but held that invocation of the Fifth Amendment itself constituted a ground of dismissal. This opinion was contrary to the adopted policy of the Board of Trustees, as later affirmed in the announcement of dismissal of the faculty member: "the dismissal . . . is based on the circumstances of his own particular case and does not, therefore, indicate any change in policy of the Board of Trustees that the invoking of privilege under the Fifth Amendment is not, in and of itself, cause for dismissal. . . ."

[2] On June 20, 1953, the Board of Trustees considered the findings and recommendations of the Faculty-Trustee committee and suspended the faculty member indefinitely and without pay, as of July 15, 1953, "unless on or before that date he advises the president in writing of his willingness to go down and appear before the Jenner Committee and answer fully and freely any questions that committee may see fit to put to him, and that on or before that date he offers to the Jenner Committee to do so."

[3] On August 14, 1953, the faculty member was informed that, according to the general policy of the University, a Board of Review had been constituted, before which he could be heard on three charges: (1) that he had refused to testify before the governmental subcommittee and had invoked the Fifth Amendment; (2) that he "improperly invoked the Fifth Amendment for the protection of others and not for his own protection"; and (3) that he was guilty of "conduct which justifies his discharge in that he has refused to disclose fully his connection with the Communist Party prior to 1948, if any." The Board consisted of 20 members of the Board of Trustees, 4 members of the College of Medicine, and a five-man Faculty Policy Committee. At the hearing on August 29, the faculty member was represented by counsel, as was the Board of Trustees. The hearing was public, and two representatives of the American Association of University Professors were present by invitation. In the final announcement of their decision, the Trustees evidently dismissed the first charge, since they specifically reaffirmed their policy on the invocation of the Fifth Amendment. They also stated that the subject matter of the second charge was not a factor considered by them in their final action; and they made no specific reference to the third charge.

[4] During the hearing it became evident that counsel for the faculty member had refused to permit him to testify in a public hearing regarding events prior to his association with the University of Vermont, on July 1, 1948. Although the faculty member had originally agreed to a public hearing, he therefore now refused to testify in public to any events before January 1, 1948; but he expressed willingness to answer every question regarding the earlier period in a private session, at which no record would be taken. This offer was refused by a vote of 15 to 8. The remainder of the hearing included testimony by the faculty member in regard to his associations and beliefs after January 1, 1948, including a cross-examination by one trustee into many factual details, seemingly to establish that the faculty member's inability to remember some of them was evidence of evasiveness and untrustworthiness.

[5] The final decision by the Trustees to dismiss the faculty member represented their "considered opinion . . . that he has failed to display to a sufficient degree in his actions and statements during the past five months, both before the committee of Congress and before the University bodies, the qualities of responsibility, integrity, and frankness that are the fundamental requirements of a faculty member. The actions referred to include, but are not limited to, his invoking of the Fifth Amendment." The faculty member was given a year's terminal salary.

[6] This Committee had not completed its recommendations as to the University of Vermont at the time this report went to press. They will be submitted for distribution in advance of the Association's 1956 Annual Meeting and for publication in the next issue of the *Bulletin*.[1]

II

Before this case arose, the Articles of Organization of the University of Vermont already contained provisions concerning the procedure to be followed in a case of contemplated discharge of a faculty member. Article X, Section 14 provided that the Board of Trustees should make the final decision, after a hearing in which counsel should be allowed, and of which a full stenographic record should be made available to the parties. This hearing should be held by a Board of Review made up of the Trustees, the Policy Committee of the University Senate, and four teachers of the college directly concerned.

But in April, 1953, nobody at the University of Vermont seems to have thought of these provisions. The President of the University was new in office and was not cognizant of all the procedures in its Articles of Organization. When it became known that Dr. Novikoff had been subpoenaed, the University issued a four-point statement of policy which had been reviewed by the Administrative Council of Deans, the Senate Policy Committee, and the Executive Committee of the Board of Trustees. The statement provided, among other things, that any faculty member claiming privilege under the Fifth Amendment should be immediately relieved of his teaching duties and investigated by a faculty-trustee committee, which should then recommend the final action to be taken.

Dr. Novikoff did claim the privilege, with respect only to questions about his activities before he had joined the Vermont faculty in 1948. Thereupon the President promptly appointed the Trustee-Faculty Committee, whose actions are described in paragraph 1 of the original report; but Dr. Novikoff was not suspended immediately, although, as previously noted, he was relieved of his teaching duties.

This move by the President appears to have been made with a desire to provide a full opportunity to obtain all possible evidence bear-

[1] *Bulletin*, Spring, 1956, pp. 83–85.

ing on Dr. Novikoff's fitness to be retained. The Committee's hearings were lengthy, private, and friendly. Colleagues, students, and friends of Dr. Novikoff testified, as well as Dr. Novikoff himself. A stenographic record was made (and checked by a tape recorder, the tape of which was later destroyed). Dr. Novikoff gave the Committee a considerable amount of information about his activities before 1948. Much of this information was given confidentially and by consent was left off the record. There seems to be no reason to question that this hearing was procedurally fair and adequate as an initial inquiry and that it was satisfactory to both the Committee and Dr. Novikoff.

The Trustee-Faculty Committee was unanimous in finding that Dr. Novikoff was "a sincere and tireless" research scientist and "a person of veracity," respected personally and professionally; that he had had no Communist connections and had not advocated any Communist ideas since coming to Vermont in 1948—or, in fact, since 1945; "that his candid attitude, his willingness to testify in all honesty, and to cooperate with the committee, were of the highest level." One of Dr. Novikoff's reasons for refusing to testify before the Senate Subcommittee was found to be "his method of protection against what seemed to him to be inquisitorial methods." The committee voted 5 to 1 that Dr. Novikoff should be retained as a member of the faculty. It is to be noted that the lone dissenter joined in all of the subordinate findings.

These findings and the recommendation to retain then went to the Trustees, but were not released publicly until after the second hearing, at the end of August; or even to Dr. Novikoff until after repeated demands by him and his counsel, and then just before the second hearing. The transcript of the testimony taken at the first hearing was not released publicly until after the second hearing and then, apparently, in an incomplete form.

The reasons of the Board of Trustees for overruling the Committee's recommendation and for deciding upon a conditional suspension at that point are unclear. At the present time nobody seems to remember the discussions in any detail. There were rumors and newspaper reports that political pressures were aimed at the Trustees, at this time and on later occasions. No positive effect of any such pressures was confirmed, however, by any substantial, specific evidence.

The local chapter of the American Association of University Professors addressed to the President of the University, on July 10, 1953, a resolution pointing out that the correct procedure had not been followed and asking that there be "a complete rehearing of the case." The President thereupon set out to rectify the error, and formed the kind of Board of Review called for by the Articles of Organization. All six members of the original Trustee-Faculty Committee were members of this Board

of Review; but one of them was absent at the time of the hearing of August 29.

This was the beginning of the second stage, which is the one described in paragraphs 3 and 4 of the original report. Several features need comment.

First. This new hearing was seemingly not thought of by anyone concerned as an appeal. It was a hearing *de novo* on the three charges, now formulated for the first time. This was the best reason which our informants could give—and many of them gave it—for the fact that the report and recommendations resulting from the first hearing were almost entirely ignored in the second, where the Board of Review failed to rule at all on an offer of the report in evidence and reserved for a subsequent executive session the question whether to release that report and the transcript on which it was based. A single copy of the transcript of the first hearing had been available in the President's office for consultation by Trustees and members of the Board of Review prior to the second hearing, but a number of them had apparently had little if any opportunity to study it carefully.

Second. Dr. Novikoff had at first said that he would not object to the proposal that the second hearing be a public one. Then his counsel, at a sort of "pre-trial conference," discovered that the University's counsel was threatening to produce witnesses to testify concerning allegedly serious subversive activities before 1948. (No such witnesses were in fact produced.) Because of this threat, the attitude and policy of "the defense"changed.

Third. The second hearing degenerated into a wrangle, partly as a result of the fact that it became a battle between opposing counsel. Dr. Novikoff's counsel, who had taken the case out of a sense of professional duty, advised his client not to answer in public, or even privately on any record, questions about possible Communist connections during the years before 1948. The reason given was that if he did so he would jeopardize his immunity to further questioning before the Senate Subcommittee and would vacate his claim to the protection of the Fifth Amendment. This position was not unreasonable, but it annoyed counsel for the University and accentuated the tendency of the hearing to become a bitter adversary proceeding—an inexcusable perversion of a process which ought to have been a dispassionate investigation into the facts.

Fourth. Virtually no evidence of any sort bearing on Dr. Novikoff's professional fitness was presented at this hearing, and nothing at all concerning any "unfitness to teach because of incompetence, lack of scholarly objectivity or integrity, serious misuse of the classroom or of academic prestige, gross personal misconduct, or conscious participation

in conspiracy against the government."[1] Actually, the only evidence in the second hearing, in addition to that described in paragraph 4 of the original report, was that of character witnesses favorable to Dr. Novikoff.

Fifth. The crucial vote which refused, by 15 to 8, to grant Dr. Novikoff's request for a private session at which his answers would be off the record, was evidently the result of diverse motives. There was, of course, a provision in the University's statutes that "there shall be a full stenographic record of the hearing available to the parties concerned." But it is not clear that this provision, in the minds of the members of the Board of Review, precluded off-the-record discussions with the person who had been charged. Some members of the Board of Review seem to have been moved by the fear of a strong public reaction if what had been "billed" as a public hearing were converted into a private one; others, by doubts whether Dr. Novikoff's offer had been made in good faith. If he was really willing to testify privately, but not publicly, why had he not objected to a public hearing at first? Was the offer, made so belatedly, a trick intended to place the Board in a dilemma? Unfortunately, the reasons which this investigating committee now sees as explaining the change of attitude on the part of Dr. Novikoff and his counsel were not at that time apparent to the members of the Board of Review.

The Board of Review, by a reported vote of 14 to 8, recommended dismissal. Three of the five members of the original Trustee-Faculty Committee who actually served on the Board of Review changed their votes to votes for dismissal; one adhered to his vote for retention; the dissenting Trustee of the Trustee-Faculty Committee adhered to his previous position.

The Board of Trustees adopted the conclusion of the Board of Review. It issued a long resolution reviewing the case. As indicated in paragraph 5 of the original report, the ground for the discharge was a lack of "responsibility, integrity, and frankness" before the Senate subcommittee and the University bodies, from April through August of 1953.

This decision must be evaluated in the light of (a) the Trustees' explicit accompanying statement that the "actions referred to include, but are not limited to, his invoking of the Fifth Amendment"; (b) the unanimous finding of the Trustee-Faculty Committee (the only body of the University which had any adequate basis for judgment) of the "highest level" of candor and cooperativeness; and (c) the absence of any positive evidence anywhere in the record of lack of responsibility, integrity, or frankness during the preceding five months, except inso-

[1] "Academic Freedom and Tenure in the Quest for National Security," *Bulletin*, Spring, 1956, p. 58.

far as the refusal to testify in the final public hearing might be so regarded. (Off the record, the University's counsel had made such charges as are indicated in c.)

The offer by Dr. Novikoff to testify confidentially, despite his refusal on advice of counsel to testify publicly or for a permanent record, shows in our opinion that there was no rational basis for a finding of lack of responsibility, integrity, and frankness. It would seem that the dismissal was in fact based on Dr. Novikoff's invocation of the Fifth Amendment or his later refusal to testify publicly. The former was specifically disclaimed by the Trustees as a sufficient reason for dismissal; and under the circumstances of this case, the latter reason was also insufficient.

Were there other grounds for the judgment? The evidence remains unclear and conflicting. That there were honest doubts as to the acceptability of Dr. Novikoff's conduct in the minds of some members of the Board of Review and some members of the Board of Trustees seems admissible, but the grounds of these doubts cannot be substantiated by the record.

From the facts set forth above, the following conclusions are to be drawn:

1. Clear and unjustifiable violations of academic tenure occurred (a) when Dr. Novikoff was suspended without pay unless he would testify fully before the Senate subcommittee (see paragraph 2 of the original report), and (b) when he was discharged (see paragraph 5). No justification was shown for the suspension, and the penalty of dismissal was not based on a stated charge of which there was any specific evidence, or on any conclusion that was properly inferable from what took place at the hearing. In the final hearing, the evidence adduced at the first was ignored, and it was not weighed justifiably in the final statement of grounds for the dismissal; without reference to it there was no proof or adequate evaluation of anything.

2. The second hearing, although before a properly constituted Board of Review, was most unfortunate in character, in that it was conducted too much like a criminal trial, with the University's counsel playing the role of a determined prosecutor, rather than in the manner of an investigation of facts relevant to professional fitness. Furthermore, the tribunal should have availed itself of the opportunity to utilize the evidence adduced in the earlier hearing.

III

The actions taken by the Trustees of the University of Vermont in this case were grave offenses against recognized principles of tenure

and academic freedom. Standing alone at the time, they would have merited severe condemnation. But these matters do not stand alone. It is the committee's conviction, based on later events, that this case has come to be recognized by the Administration of the University, as well as by the faculty, as a deplorable stain upon an institution otherwise devoted to intellectual freedom; and that earnest efforts have been made to prevent future abuses of a like kind.

The procedure to be followed in the future at the University of Vermont has been greatly improved. The following is a summary of the provisions which will apply in cases of dismissal for cause:

Evidence will be presented in writing to the appropriate dean, signed by the person who brings the charges. If the dean deems the evidence sufficient to warrant further proceedings, the charges will be presented both to the President of the University and to the accused person. A committee of nine members will then be appointed to investigate the charges and to make recommendation to the Trustees. This committee will consist of the President, three trustees elected by the Board of Trustees, three faculty members nominated by the Policy Committee and appointed by the President, and two members of the faculty of the college of which the accused person is a member, elected by that faculty. The investigating committee will hold hearings, formulate a report, and make recommendations to the Board of Trustees. The accused person may have legal counsel, or an adviser at all hearings. The accused person, each committee member, and each member of the Board of Trustees will receive not only a copy of the report, but also a full stenographic record of all hearings. There will follow a delay of fourteen days, during which the accused person will have the right to appeal from any adverse recommendation to the Board of Trustees, where he may have a new hearing under conditions carefully provided. In case there is no appeal, and the Board concurs in the recommendation, it will make a final decision. If it "considers that the conclusions of the Investigating Committee were not warranted by the evidence or were based upon inadequate evidence, the Board conducts a hearing" in the same manner as if there were an appeal, and makes a final decision. During the course of an investigation, whenever the Administrative Council deems it advisable, a faculty member may be relieved of his duties pending the decision, but with continuation of regular salary. A dismissed faculty member who is on tenure, except in cases of dismissal for moral turpitude, will receive salary for one year.

This plan has been formally adopted both by the University's Senate[1] and by its Board of Trustees. Reading these provisions makes it clear that care has been taken to remedy the flaws in procedure which led to the miscarriage of justice in the case now under consideration.

Even more significant, perhaps, is the adoption, on September 23, 1954, by the faculty, and the endorsement by the Board of Trustees, of

[1] The Senate consists of the faculty and certain administrative officers.

a statement on "Academic Freedom and Responsibility" which is now printed in the Faculty Handbook. Its language and spirit warrant its full quotation:

We, the Faculty of the University of Vermont and State Agricultural College, in the spirit and tradition of free universities throughout the world, are agreed upon the following statement of principles on academic freedom and responsibility.

We believe that incorporation of these principles into the organization of the University of Vermont and State Agricultural College will re-emphasize the importance of academic freedom to the basic health of the University, and also serve as a statement of policy on the rights and responsibilities of faculty members at this institution. It has been our intent to state these principles in terms broad enough so that they may be valid not only in these critical times when academic freedom and personal liberty are in jeopardy both at home and abroad, but also in the future insofar as the future can be foreseen.

1. *The Necessity of Academic Freedom in Higher Education.*

The main purpose of a university has always been, must always be, to stimulate the thinking and the creative powers of its students and its faculty. As an institution it deals in ideas, not only old and accepted ones but new ones that may be full of explosive power. If they are explosive they are bound to be disconcerting, even painful to some on the campus and to many beyond its borders. Inevitably they will be called dangerous by the timid and shortsighted. But to those who really believe in the fruitfulness of human thought, the real danger would appear only if the flow of such ideas should cease. For then indeed sterility would have taken over our campus. Our faculty would no longer deserve the name of intellectuals and our students, regardless of degrees attained, could no longer claim to be educated. They would leave our campus accustomed only to the commonplace, satisfied with the mediocre, ignorant or afraid of ideas which catch fire. Academic freedom is therefore not solely a right or privilege of the faculty but is the fulfillment of the obligation on the part of the university to provide an atmosphere in which intellectual growth may take place.

2. *Academic Freedom and Special Responsibilities of Faculty Members.*

We subscribe to the following statement on academic freedom and the responsibilities of faculty members adopted by the American Association of University Professors:

The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the administration of the institution.

The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of

academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

The teacher is a citizen, a member of a learned profession and an officer of this institution. When he speaks or writes as a citizen he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

In addition there are recognized qualifications which must be attained and maintained before the privilege of being a member of the academic profession can be considered a permanent one: satisfactory performance as a teacher, scholarship, and high moral standards.

3. *Responsibility of the Institution to the Faculty.*

The university must defend tenaciously the right of its members to think and express their thoughts freely and to make those choices within the law guaranteed to every citizen. This includes the right of dissent since any democratic institution ceases to merit the name democratic when this fundamental right is denied. Never is this duty more imperative than in those unhappy times when the public opinion of the community would restrain or curtail the free play of ideas. The universities, whose roots extend back into the centuries, have a tradition and a duty to maintain an independence of judgment in the face of public emotion. While the universities must be sensitive to the needs of the community and nation, they need not and should not abrogate their position of leadership. This duty of the institution has never been so well stated as by Thomas Jefferson in his letter to prospective faculty members at the University of Virginia: "For here we are not afraid to follow truth wherever it may lead, nor tolerate error so long as reason is free to combat it."

4. *Academic Freedom and Tenure.*

Tenure is an indispensable precondition for academic freedom. It is, in fact, a guarantee that the institution subscribes to the principle of academic freedom, and that its members may not be dismissed without adequate cause. Termination of tenure should occur only in cases of *bona fide* financial exigency in the university or when it has been demonstrated that the teacher lacks professional or moral fitness or competence as a teacher.

In the interpretation and the application of these principles we shall expect the university authorities to be quick to protect its heritage of academic freedom, in doubtful cases remembering that an excess of freedom is always less dangerous than an excess of constraint.

The committee of inquiry is unanimous in believing that the evidence of an increased freedom of mind and improved safeguards for tenure which the foregoing statement supplies, coupled with the present posture of the dismissal case itself, modify significantly the situation at the Uni-

versity of Vermont. Only if similar cases were to arise in the future, of course, would it be possible to see whether the University would truly adhere in spirit to the proposition that invoking the Fifth Amendment is not in itself sufficient ground for removal. The Supreme Court of the United States, in *Slochower* v. *The Board of Higher Education of New York City*, April 9, 1956 (350 U. S. 551), has upheld this proposition under the Fourteenth Amendment, as applied to positions, including faculty positions, in state agencies. The issue thus focuses sharply on the question of the nature and extent of the additional evidence required to warrant a dismissal, and on the question whether a faculty member who declines to make nonconfidential disclosures to his institution after having invoked the Amendment, but who is willing to give information off the record and in confidence, satisfies the duty resting upon him. The Special Committee of the Association and the Forty-second Annual Meeting have spoken in regard to the first of these questions (*Bulletin*, Spring, 1956, pp. 57–58, §5; Summer, 1956, p. 339). This question is involved in other pending cases, as well as in the present one. The second of these questions is difficult, and it is one which the Association still has under study. Its importance leads the present committee to suggest that the Association ought to formulate its policy on the matter more explicitly. But even in the absence of a general statement of principle on this point, the committee is convinced that in the present instance a serious injustice was done because of rigid and unnecessary adherence to a procedural requirement that testimony be public and on the record.

Bentley Glass (Biology), The Johns Hopkins University, *Chairman*
Fred B. Millett (English), Wesleyan University
Bertram F. Willcox (Law), Cornell University

New York University

In December, 1956, the undersigned were appointed as a committee to investigate the actions of New York University in dismissing Associate Professor Lyman Bradley in June, 1951, and Associate Professor Edwin Berry Burgum in April, 1953, and to render a report supplementary to the treatment of these cases in the report of the Special Committee on Academic Freedom and Tenure in the Quest for National Security, which was published in the Spring, 1956 issue of the *AAUP Bulletin*. This committee spent January 18 and 19, 1957, at New York University and interviewed the President of the University (who was appointed subsequently to the two cases here under review), the Vice President responsible at the time of the two dismissals for "the supervision of the system of tenure," the Dean of the Washington Square College of Arts and Science who brought and argued the charges against Professors Bradley and Burgum, three members of the University faculty who served on the two committees that conducted the hearings in these cases, other members of the faculty, and Professors Bradley and Burgum.[1]

The two cases here under review involved men holding the rank of associate professor with tenure. Each man had served on the New York University faculty for more than two decades. The dismissal proceedings in each case were held under the University's *Statement of Policy in Regard to Academic Freedom and Tenure*, which was originally adopted and made effective by the University Council on September 1, 1948.[2]

[1] At the time of the two cases, the executive head of the University had the title of Chancellor, and his immediate assistants were known as Vice Chancellors. These titles were later changed to President and Vice President (*New York University Charter and Bylaws*, July 1, 1956). The full transcripts of the hearings in the two cases and copies of other relevant documents were made available to this committee.

[2] The University Council was the governing board of the institution. It is now called the Board of Trustees. Since the difficulties that led to Professor Bradley's dismissal originated in the spring of 1946, and his suspension from his teaching post became effective on August 31, 1948, it is too sweeping to say that his case was at all stages handled under the University's *Statement of Policy*. However, the formal dismissal proceedings against him were not brought until some two years after the *Statement* became effective, and University officials seem to have regarded the *Statement* as applicable to the proceedings. At the time of the hearing, University officials conceded that Bradley had tenure, but when he later brought suit in the New York Courts against the University for back pay, it was claimed that he really had not had tenure, since he had in effect been dismissed before the *Statement of Policy* (establishing tenure) took effect.

In general, this is an admirable statement. Parts of it are closely patterned after the 1940 Statement of Principles on Academic Freedom and Tenure of the Association of American Colleges and the American Association of University Professors. Relevant portions of the New York University policy statement are as follows:

Statement of Policy in Regard to Academic Freedom and Tenure[1]

* * * *

II. Academic Freedom

* * * *

The teacher is entitled to freedom in the classroom in discussing his subject, but he should not introduce into his teaching controversial matter that has no relation to his subject.

The teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen he should be free from institutional censorship or discipline, but this special position in the community imposes special obligations. As a man of learning and an educational officer he should remember that the public may judge his profession and his institution by his utterances. Hence he at all times should be accurate, should exercise appropriate restraint, should show respect for the opinions of others and for the established policy of his institution, and *while properly identifying himself to outside audiences as associated with the University* should clearly indicate that he is not an institutional spokesman *unless specifically commissioned to serve in such a capacity.*

III. Academic Tenure

* * * *

2. . . . After expiration of the stipulated probationary periods, full-time associate professors and professors are considered to have permanent or continuous tenure, and their services are to be terminated only for adequate cause, . . .

* * * *

8. . . . Termination for cause of a continuous appointment . . . shall be considered by an appropriate faculty committee if the teacher requests a hearing on the case. In all cases where the facts are in dispute the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at

[1] *New York University Faculty Handbook* (April, 1955), pp. 29, 30, 32, 35.

least a year from the date of notification of dismissal, whether or not they are continued in their duties at the institution.

* * * *

Responsibility of the Teacher

All University officers of instruction are expected not only to meet their classroom assignments with professional skill and efficiency but to render common service at every possible turn in the form of general advisory assistance to students. Both outside the classroom as well as in the course of formal classroom exercises the teacher, according to basic tenets of the academic profession, is in a position to exert vast influence upon student attitude and performance of inestimable value to the University Program and is expected to exercise to the best of his ability that privilege and responsibility.

This policy statement does not designate the particular "faculty committee" before which dismissal proceedings are to take place. In the Bradley and Burgum cases there was some measure of uncertainty about the "appropriate" committee to hold the hearings. There existed at the Washington Square College of Arts and Science a Board of Review with authority to review faculty grievances. Conceivably, the charges against the two teachers might properly have been referred to this agency on the ground that the charges could best be evaluated by persons associated with the two men on their own college faculty. But the University Council directed in each case that the charges should be considered by the "Senate Faculty Committee," a body of some twelve teachers individually elected to the University Senate from the widely scattered colleges and professional schools of the entire University. While there may have been arguments that the former body was the more appropriate one to hear these cases, the decision to use the latter agency cannot be criticized.

In each case it was made clear by the University Council that the Faculty Senate Committee was to act only as an advisory body to "review" the charges against the accused teacher and to "report" its findings to the governing board for final action. Since under many college and university charters final authority over personnel matters is vested in governing boards, this arrangement is necessarily an acceptable one in dismissal proceedings. But a proper concern for academic due process requires that a governing board give close and respectful attention to the findings of the tribunal that conducts the hearings in such a case. Ordinarily, a governing board should be guided in its disposition of a case by the recommendations of this tribunal.

It should be remembered that at the time of these cases neither the officials of New York University nor the two professors had the benefit of the experience and wisdom that certain recent events have supplied. An important refinement of principles affecting academic freedom and tenure was made by the American Association of University Professors

in 1956.[1] The power of Congress and of state agencies to conduct investigations, and the right of witnesses before such governmental bodies to refuse, on grounds of possible self-incrimination and on other grounds, to testify were substantially clarified and perhaps altered by decisions of the United States Supreme Court rendered between 1953 and 1957.[2] On the other hand, neither side in these cases was wholly without guides for a course of action consistent with sound principles of academic freedom and tenure. Substantial formulations of these principles were available at the time of these cases.[3] Similarly, older rulings by the United States Supreme Court did throw considerable light on the nature and extent of the investigating power, as well as on the rights and obligations of witnesses appearing before investigating committees.[4]

I. The Bradley Case

In the spring of 1946, Lyman R. Bradley, Associate Professor and Chairman of the Department of German at Washington Square College of New York University, was subpoenaed to appear before the Committee on Un-American Activities of the United States House of Representatives, which was investigating the Joint Anti-Fascist Refugee Committee, an allegedly Communist-front organization. Professor Bradley was treasurer of the organization. He and other members of the organization's executive board were directed by the House Committee to produce the organization's records. This they failed to do, both as individuals and as a board. At a hearing of the House Committee, on April 4, 1946, Professor Bradley was asked to tell how he had voted at a meeting of the executive board of the Joint Anti-Fascist Refugee Committee on a motion directing the agency's chairman not to produce its records before the House Committee. Professor Bradley refused to answer the question on the ground that it was not pertinent. When asked whether he, himself, was prepared to produce the records, he insisted upon the right to read a statement, asserting that "the purpose of the question [would be] served by reading this paper." He was not

[1] Report of the Special Committee on "Academic Freedom and Tenure in the Quest for National Security," Section B, "Relevant General Principles," *AAUP Bulletin*, Spring, 1956 pp. 54–61. This report is referred to hereafter as the Report of the Special Committee.

[2] See, for example, *United States* v. *Rumely*, 345 U. S. 41 (1953); *Quinn* v. *United States*, 349 U. S. 155 (1955); *Emspak* v. *United States*, 349 U. S. 190 (1955); *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956); *Watkins* v. *United States*, 354 U. S. 178 (1957); *Sweezy* v. *State of New Hampshire*, 354 U. S. 234 (1957).

[3] See, for example, in addition to the 1940 Statement of Principles, "Academic Freedom and Tenure: Report of Committee A for 1947," *AAUP Bulletin*, Spring, 1948, pp. 110–113, and subsequent Annual Committee A reports, *passim*.

[4] See, for example, *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929).

allowed to read the statement. He did not invoke the privilege of the Fifth Amendment against self-incrimination.[1] Because of their failure to supply the records and to answer the House Committee's questions, Professor Bradley and sixteen other members of the executive board of the Joint Anti-Fascist Refugee Committee were cited for contempt by the House of Representatives. In accordance with the usual procedure in such matters, they were thereupon indicted by a federal grand jury in the District of Columbia for violation of the federal Contempt of Congress Act.[2] The defendants were tried together before a jury in June, 1947, and all were found guilty. Professor Bradley was sentenced to ninety days in jail. Five members of the group purged themselves by indicating that they would produce the records if it were within their power to do so. They were given suspended sentences. Other members of the group, including Bradley, appealed the adverse judgment to the higher courts. On March 18, 1948, the Court of Appeals for the District of Columbia upheld the conviction by a two-to-one vote,[3] and on June 14, 1948, the United States Supreme Court refused to review the case, denying defendants' petition for certiorari. This petition was renewed by the defendants, but two years later, on March 29, 1950, the Supreme Court made final its refusal to review the case.[4] Thereupon, in the summer of 1950, Professor Bradley served his ninety day jail term.

Some six days after the original jury verdict against Bradley in June, 1947, Dean T. C. Pollock "relieved" Professor Bradley of his chairmanship of the Department of German at Washington Square College. His status as an associate professor was not disturbed, and he continued to teach his classes. During the latter part of 1947, Professor Bradley undertook to defend his position publicly. This defense took the form of a document, *Professor Bradley States His Case*, which was

[1] Read today, the transcript of the hearing reveals that the proceedings before the House Un-American Activities Committee were conducted without the dignity and order that may properly be expected of a committee of the national legislature. Professor Bradley was a recalcitrant witness. But the Committee's counsel, Mr. Ernie Adamson; its chairman, Representative J. Parnell Thomas; and Representatives John Rankin and Karl Mundt were exceedingly abusive in language and demeanor. The witness was not allowed to bring his counsel into the hearing room, he was not allowed to leave the room to consult with his counsel during the questioning, and he was not allowed to read his written statement. At one point Representative Rankin stated, "Now the next question he refuses, just call up the marshal and send him to jail."

[2] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry . . . wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." Section 192, Title 2, United States Code.

[3] 167 F. 2d 241 (1948).

[4] 334 U. S. 843 (1948); 339 U. S. 971 (1950).

circulated to the faculty of Washington Square College; several letters in Washington Square College publications; and interviews in the public press.

On June 21, 1948, a few days after the United States Supreme Court first refused to review the case, Chancellor H. W. Chase suspended Bradley from his position as Associate Professor. Chancellor Chase wrote Professor Bradley that the Supreme Court's failure to take jurisdiction meant "that no further appeal is possible in your case." The suspension was "to continue at least throughout the first semester of the academic year beginning September 1st [1948]." The Chancellor assured Professor Bradley, "The question of your ultimate status will not be determined without opportunity on your part to state your case to whatever agency the University may set up to reach a decision." Professor Bradley did no teaching thereafter. His salary was paid to the end of the University's contract year, August 31, 1948, but not during the thirty-four months that went by before his dismissal from the University was made final on June 20, 1951.

On October 11, 1948, shortly after Professor Bradley's suspension was made effective, he took part in a student meeting at Washington Square College. The meeting was ostensibly a rally of "Students for Wallace for President." Professor Bradley had been invited to address the rally on the campus, but Dean Pollock ruled that as a suspended teacher he could not do so. The students then requested and were granted an afternoon appointment with Dean Pollock in his office to discuss the ruling. Professor Bradley later claimed that he had no foreknowledge of these arrangements but that when he was invited by the students to accompany them to the Dean's office he did so, seizing upon this as an opportunity to ask for clarification of his status and rights as a professor under suspension. Because of a widely-publicized student disorder at the City College of New York a few days earlier, and the appearance on the Washington Square College campus of vigorously-worded posters and leaflets, Dean Pollock feared that the meeting in his office might prove disorderly, and he made arrangements to control the situation. The action of "calling a mass protest rally at the Administrative Offices" was later described by the Student Council of Washington Square College as "impetuous, improper, and potentially disorderly." But a tape recording made by Dean Pollock during the meeting with the people who were admitted to his inner office indicated that no actual disorder occurred during that meeting.

Professor Bradley attempted, early in 1949, to persuade Chancellor Chase either to terminate his suspension or to give him an immediate hearing. The Chancellor refused to take either of these steps at that time. He wrote Professor Bradley that, since he was under sentence of

imprisonment and the United States Supreme Court might hand down its final ruling in the case at any time, "the presumption that you may be ordered to serve that sentence during the spring term of the University still exists. I cannot agree to a recommendation to terminate your suspension under these conditions." The Chancellor added, "The same cause still delays a hearing for you. Any hearing, to be fair to all concerned, must include the final verdict of the Supreme Court. Any other kind of hearing would necessarily be partial and inconclusive, and I see no advantage to be derived from it that would serve the ends of justice in your case."

Nearly two years later, after the Supreme Court had for the second and last time refused to review the case and Professor Bradley had served his prison term, Chancellor Chase notified Professor Bradley in writing that the University was bringing formal charges against him. The charges had been formulated by Dean Pollock, and were as follows:

1. Professor Lyman R. Bradley is unfit to teach in New York University because he has been convicted of a crime, to wit, contempt of Congress.
2. Professor Lyman R. Bradley is unfit to teach in New York University because he has made misrepresentations and false statements in his personal interest to the faculty and students in New York University.
3. Professor Lyman R. Bradley is unfit to teach in New York University because he participated in and was responsible for an impetuous, improper, and potentially disorderly demonstration on October 11, 1948, at Washington Square College in his personal interest.

The hearings on the charges were conducted on January 3, 4, and 5, 1951, before eleven members of the Senate Faculty Committee. Dean Pollock presented the case against Professor Bradley. Professor Arad Riggs, of the New York University School of Law, served as Dean Pollock's counsel. Professor Fowler Harper, of the Yale University Law School, served as Professor Bradley's counsel. The transcript of the hearings runs to 310 pages. In a brief report to the Chancellor and the University Council, on February 26, 1951, the Senate Faculty Committee stated it had held "five long deliberative sessions and devoted much time and attention to studies of the Transcript and Exhibits." The Committee voted separately on the three charges. (The chairman did not participate in any of the votes.)

On Charge One, the Committee first found, by a vote of 9 to 1, that Professor Bradley might "be dismissed without doing violence to the [New York University] Statement of Policy in Regard to Academic Freedom and Tenure." Seven members then voted that Professor Bradley should be dismissed under this charge, and two members refrained from voting on the charge. The Committee voted 9 to 1 not to

sustain Charge Two, the Committee finding "that the acts and conduct of Professor Bradley have not been proved to furnish adequate cause for his dismissal under the Statement of Policy in Regard to Academic Freedom and Tenure." The Committee was equally divided, 5 to 5, on Charge Three, and again the finding was couched in terms of whether or not "the acts and conduct of Professor Bradley have . . . been proved to furnish adequate cause for his dismissal under the Statement of Policy. . . ."

The Faculty Committee did not accompany its recommendations to the University Council by a formal written opinion. Five separate memoranda were written by members of the Committee and transmitted to the Council. Three of these were extremely brief. The memorandum by Professor Hollis R. Cooley was a carefully reasoned statement of a vote in Professor Bradley's favor on all three charges. The memorandum by Professor Charles Hodges was an equally careful statement of the case against Professor Bradley, particularly on Charge One.

On March 26, 1951, the University Council held a forty-five minute session, at which Professors Riggs and Harper and Dean Pollock spoke briefly. Professor Bradley was present but did not speak. Professor Carl H. Fulda, of Rutgers University, was present at this meeting as an observer for the American Association of University Professors. Professor Riggs insisted on a consideration of all three charges, and alluded to substantially the same evidence which he had introduced at the Faculty Committee hearings. He asserted, ". . . the crime [Charge One] is important. The other two charges were important. They are part of a pattern. . . ." Professor Harper referred briefly to the second and third charges, but he reminded the Council that neither had been sustained by a majority of the members of the Faculty Committee. Accordingly, he devoted most of his attention to Charge One.

On June 20, 1951, the University Council voted to ratify the 1948 suspension of Professor Bradley and to make his dismissal without pay effective as of that date. The Council's decision, which was little more than a formal order of dismissal, was communicated to Professor Bradley on June 26. The relevant portions of the Council ruling were as follows:

> Due deliberation having been had on the charges that Professor Lyman R. Bradley is unfit to teach in New York University because he has been convicted of the crime of contempt of Congress, has made misrepresentations and false statements in his personal interest to the faculty and students of New York University, and has participated in and assumed responsibility for an impetuous and improper student demonstration on the premises of the University on October 11, 1948; and due deliberation having been given to the entire record, the report of the Faculty Committee, and the arguments of counsel for Professor Bradley and Dean Pollock; and

It satisfactorily appearing to the Council that the record discloses that, in accordance with the provisions of Sections 8 and 9 of the Rules of Tenure of New York University, the tenure of Lyman R. Bradley should be terminated and no salary should be paid to him for any period of time subsequent to August 31, 1948;

Now, in accordance with the provisions of the Charter of the University . . .

IT IS RESOLVED: (1) That the existing suspension of Lyman R. Bradley and his deprivation of privileges and duties as a member of the faculty and associate professor in Washington Square College be and the same hereby are ratified and confirmed; and (2) that Lyman R. Bradley be and hereby is removed and dismissed from the faculty of New York University without salary for any period after August 31, 1948.

Subsequent to his dismissal, Professor Bradley brought suit against New York University in the New York courts for back pay during the period of suspension, and for one year's severance pay following his final dismissal. The University vigorously defended itself against this breach of contract charge. The trial court found that the University had not violated its contract with Professor Bradley with respect either to pay during the suspension period or severance pay at the time of the final dismissal. This decision was based on a number of grounds. The court found that the University's custom of sending out annual notifications of salary status meant that there existed at the University a system of one-year contracts only. It also took notice of the fact that the "Statement of Policy in Regard to Academic Freedom and Tenure" did not take effect until September 1, 1948, which was one day after Professor Bradley's last annual contract with the University expired, and that, in any case, the Statement contained a clause expressly disclaiming any contractual relationship under its terms. The court further rejected the argument that as a "tenured professor" Professor Bradley had certain rights which the University had violated, holding that "in the most favorable view" tenure meant only that a teacher was "not subject to summary administrative dismissal." Since the record showed plainly that Professor Bradley had been accorded "a full and fair hearing" and had not contended "that his dismissal was arbitrary or unreasonable in any way," he had no case against the University as a "tenured professor." The New York appellate courts subsequently sustained this ruling.[1]

1. Procedures

The procedures followed by New York University in dismissing Professor Bradley were in conformity, in their main outlines, with the

[1] *Bradley* v. *New York University*, 124 N. Y. S 2d 238 (Sup. Ct. 1953), aff'd, 283 App. Div. 671, 127 N. Y. S 2d 845 (2d Dep't), 307 N. Y. 620, 120 N. E. 2d 823 (1954).

requirements of academic due process. Formal charges against a professor were considered by a tribunal of his peers. The teacher was allowed the benefit of counsel and an ample opportunity to be heard before the tribunal. After due deliberation, this body arrived at a finding by majority vote and transmitted a recommendation to the University governing board. The latter disposed of the case in accordance with this recommendation. But the specific way in which the University handled its case against Professor Bradley requires closer scrutiny at a number of points.

1. Dean Pollock's action in relieving Professor Bradley of his chairmanship of the Department of German following his conviction cannot be criticized. It is customary at many institutions for administrative officers to designate departmental chairmen for limited terms and, in the natural course of events, many changes are made in these designations for a wide range of reasons. Of course, deliberate removal of a teacher from a chairmanship, as a penalty for legitimate activity that has proved distasteful to administrative officers, may well constitute a threat to the teacher's academic freedom and perhaps even to his tenure. Standing by itself, this action in the present case does not seem to have presented such a threat.

Suspension of a teacher who has refused to answer the questions of, and otherwise cooperate with, a Congressional investigating committee, and who has, as a result, been convicted of the crime of contempt of Congress and is under sentence to serve a jail term, cannot be criticized. But suspension without pay is proper only under extreme circumstances. New York University might well have refused to pay Professor Bradley during the period that he was actually serving his jail term, but, as it turned out, the period of suspension in the case lasted for more than two years. Chancellor Chase's negative response to Professor Bradley's request that the University either reinstate him or give him a prompt hearing is understandable. The University was properly reluctant to let a teacher offer courses that might be interrupted by his need to serve a jail term, and final disposition of the case within the University without knowledge of the United States Supreme Court's view of the contempt charges would have been difficult. There was always the chance that the Supreme Court might have ruled that Professor Bradley was within his rights in refusing to cooperate with the Un-American Activities Committee. At the same time, it was the University's wish that the hearing be deferred, and it seems fair to suggest that, in this case of a teacher with more than twenty years of service, the University might have found a happier way of resolving the suspension-pay dilemma, pending final determination of the teacher's status.

2. The failure of both the Senate Faculty Committee and the

University Council to support their formal findings in the case with careful statements of the grounds or reasoning upon which these findings rested was a serious procedural shortcoming. If the Council was to have the full benefit of the Faculty Committee's advice, something more than the bare record of votes taken and charges accepted or rejected was called for. The five memoranda purporting to state the views of six members of the Committee may well have done positive harm. Taken together, they were unsystematic, incomplete, and ambiguous, and it was not entirely clear what weight they were supposed to carry or how they spoke for members of the Committee, either individually or collectively. The failure of the University Council to explain its adverse decision against Professor Bradley was an equally serious procedural defect, for it is not even clear that the Council followed the Committee's finding that only the first charge against Professor Bradley had been successfully supported by the University officials. It is impossible to determine what attention or respect the Council paid to the specific recommendations of the Committee on the separate charges.

3. Professor Harper, Professor Bradley's counsel, tried at several points during the hearings to obtain clarification of the charges in order that the relevancy of some of the evidence being introduced by the University might be determined. The chairman of the Faculty Committee refused these requests, ruling that both sides would be allowed "to present their cases in their own way," and that in its deliberations at the end of the hearings the Committee would itself interpret the charges and then accept or reject different portions of the evidence as relevant or irrelevant. Professor Harper also raised a question as to where the burden of the proof rested in the case, both with respect to the adequacy of the charges as a proper basis for dismissal, and the evidence that might be adduced concerning these charges. Professor Riggs, Dean Pollock's counsel, contended that the session was "not a judicial proceeding" but instead "an informal hearing," and that there was "no burden of the proof in this situation." The chairman of the Committee, while agreeing with Professor Riggs that the proceedings were not to be thought of as analogous to those in a court, ruled "that in a non-technical sense the burden [was] upon Dean Pollock to establish the charges which he [had] made and to persuade the tribunal as to the adequacy of those charges" as a proper basis for dismissal of a teacher. Under the circumstances, this was a reasonably satisfactory way of characterizing the proceedings. It would serve the interests of neither the teacher nor the institution in a dismissal case to insist upon adherence to the strict rules that govern proceedings in the criminal courts with respect to the precision with which charges must be worded, or the admissibility of evidence. But the charges must state a proper basis for

the dismissal of a teacher, they must be stated with sufficient clarity and detail to enable him to defend himself, and he is certainly entitled to enjoy whatever benefit of the doubt may exist after evidence has been presented by both sides. It is perhaps too much to ask that in a case such as this one the formal record must show that the institution has in fact sustained the burden of the proof before a dismissal takes place. But there is reason for disquietude when, as in this case, the transcript reveals a high degree of informality in the acceptance of evidence brought to bear upon ambiguous charges.

2. Charges and Findings

1. The first charge against Professor Bradley was, in its broad implications, a proper one. Professor Bradley had refused to cooperate with a committee of the Congress, and this had led to his conviction in a federal court of the statutory offense of contempt of Congress. He was under sentence of imprisonment. A teacher's institution may properly take cognizance of such a state of affairs, and conduct its own inquiry into the case in an attempt to determine whether the individual's fitness to continue as a member of the teaching profession has been compromised by his conduct.

But the wording of Charge One was ambiguous. On its face it seemed to be based on the rationale that contempt of Congress is an offense that automatically disqualifies a person from further employment as a teacher. Such a rationale is inconsistent with acceptable standards of academic freedom and tenure. Clearly, a teacher is entitled to have attention given to the particular circumstances that have led him to defy the authority of a governmental agency. The citizen's normal duty in a democratic society is that of civil obedience. But from the earliest days of such societies the duty of occasional civil disobedience has been vigorously and persuasively argued. The good citizen is occasionally justified in challenging the state in areas where the balance between governmental authority and individual freedom remains uncertain or controversial. In the Anglo-American legal and political tradition, this balance has in large part been hammered out on a case-by-case basis through adversary proceedings.

At times during the hearings, Dean Pollock and his counsel continued to maintain that the simple fact of Bradley's conviction of contempt of Congress justified his dismissal. For example, Dean Pollock stated that Professor Bradley "is guilty of contempt of Congress. The University has the right to expect that its teachers will be good citizens. In being guilty of contempt of Congress, Dr. Bradley has defied the authority of the Congress of the United States and has broken his oath

to support the Constitution of the United States." (Under New York law, teachers are required to take an oath to uphold the Constitutions of the state and of the United States. Professor Bradley had taken this oath.) And again, he stated that, "As, without question, it is the policy of New York University to uphold the Constitution of the United States and to respect the basic institutions which make possible the maintenance of our form of government and of academic freedom, Dr. Bradley has violated the distinct obligation imposed on him by academic freedom to show respect for the established policies of his institution."

But the transcript of the hearings makes it clear that a good deal of attention was paid by both sides to the circumstances that lay back of Bradley's contempt of Congress. Professor Bradley undertook to defend his failure to cooperate with the House Un-American Activities Committee by stating that his purpose was to protect the names of persons who had contributed to, or received aid from, the Joint Anti-Fascist Refugee Committee. He also argued that the right of the House Committee to seek this information from him was doubtful, and that as a citizen he was entitled to challenge the Committee's authority in order to obtain clarification of constitutional and legal issues through court decisions. He replied to the contention that he should have attempted to purge himself of his contempt of Congress, after he had been convicted in the District Court and this judgment had been upheld by the Court of Appeals, by asserting that he would have done this if the Supreme Court had also upheld his conviction in a formal opinion. (Bradley's counsel correctly pointed out that the Supreme Court's refusal to grant certiorari in the case did not mean that that Court was necessarily satisfied that the rulings of the lower courts were sound.)

Dean Pollock, on the other hand, argued that Professor Bradley's true motive in refusing to cooperate with the House Committee was an attempt to conceal the fact that the Joint Anti-Fascist Refugee Committee was a Communist-front organization, and that, more particularly, Bradley had made large and regular payments from the organization's treasury to the notorious Communist, Gerhart Eisler. Such an attempt on the part of a university to get behind a teacher's refusal to answer the questions of an investigating committee is perfectly proper. Indeed, it is necessarily the chief purpose of the university's inquiry in such a situation. But in this case the ambiguity of Charge One did place Professor Bradley at something of a disadvantage. Dean Pollock in effect stated that the University was not charging Professor Bradley with being a Communist. In particular, he asserted that the University was not challenging Bradley's ideas and beliefs or his classroom record. But the attempt to show that Professor Bradley had improper and hidden reasons for refusing to cooperate with the House Committee had much

the same result, for it allowed the University officials to introduce much evidence designed to show Bradley's identification with the Communist movement. Thus there was some justification for Professor Harper's statement at the brief University Council session that "If Dean Pollock desires to bring charges against Professor Bradley, that he is unfit to teach in this University because he, Bradley, is a Communist, or because he, Bradley, has been a Communist, I will defend Bradley but I want another hearing. The one thing we don't do in this country is to charge a man with one crime and convict him of another."

2. A careful reading of the transcript of the hearings reveals that the Faculty Committee was well advised to reject Charge Two. Dean Pollock argued that on several occasions Professor Bradley made false statements in his own interest to the faculty and students of the University. For example, he stated that in the pamphlet, *Professor Bradley States His Case,* Bradley lied when he wrote, "Dean Thomas Clark Pollock took action in temporarily suspending me while I was occupied with the trial in Washington and while the case was up for appeal to higher courts." Dean Pollock's contention was that Bradley had been "relieved" (of his chairmanship), not "suspended" (from his associate professorship), and that this action had not been taken until Bradley had been convicted in the trial court. Professor Bradley replied that his use of the word "suspended" was an honest mistake, and that Dean Pollock in describing this alleged "misrepresentation" to the Faculty Committee had been guilty of an equally serious mistake in asserting that Bradley had claimed the Dean had suspended him before his trial was completed when, in fact, Bradley had added to his phrase "while I was occupied with the trial in Washington," the qualifying clause "and while the case was up for appeal to higher courts."

It seems to members of this investigating committee that the misrepresentations attributed to Professor Bradley under Charge Two might easily have been mere honest mistakes on his part. University officials certainly failed to prove that they were deliberate and malicious. The instances of misrepresentation were so few and so inconsequential as to be trivial when considered separately from the other charges. They did not provide a basis for such drastic disciplinary action against a professor as dismissal.

3. The charge that Professor Bradley played an improper role in the student demonstration of October 11, 1948 merits somewhat more attention. Coming as it did immediately after a serious student disorder at the City College of New York, it must be admitted that Dean Pollock had cause to fear similar trouble at New York University. Since the meeting was converted from its original purpose (a student rally in behalf of the Wallace presidential candidacy) to an intercession in be-

half of Professor Bradley, it was no doubt "improper" in a technical sense. Since it involved students, faculty, and administrative officers of divergent views meeting under the pressure of high emotion, it was probably also "impetuous." All demonstrations are "potentially disorderly." The fact of the matter is that this meeting was not disorderly. This was shown by the tape recording of the meeting which was played during the Faculty Committee hearing, and Dean Pollock, under cross examination, admitted that there was no real disorder. That Professor Bradley participated in the meeting in order to advance his own personal interests is quite clearly true. But his reasons for doing so, as stated during the hearing, seem understandable if not entirely well-advised. This incident can best be described as "unfortunate"; it does not seem to have involved grossly improper intentions, and it did not result in any real mischief.

4. A word more needs to be said about Charges Two and Three. Both concerned allegedly improper conduct by Professor Bradley *after* he had been suspended by Chancellor Chase from his teaching post. In other words, neither charge went to the heart of the basic issue in the case—the propriety of Professor Bradley's non-cooperation with the Un-American Activities Committee. This is not to say that a university may never take notice of a teacher's continued misconduct occurring after the events that gave rise to the original difficulty with him. But a university must be on guard against the temptation to strengthen the case against a troublesome teacher through the addition of marginal and perhaps irrelevant charges. Moreover, it must be recognized that when a teacher is suspended, and his right to remain a member of the profession is brought into serious question, he may well react in an unfortunate way and say and do foolish things. But unless these subsequent developments are of an unusually serious character, the university will ordinarily do well to ignore them and to concentrate upon a thorough and fair inquiry into the original difficulty. In this case Dean Pollock was ill-advised to bring the second and third charges against Professor Bradley.

5. The failure of New York University to pay Professor Bradley a year's salary at the time of his dismissal merits criticism. The 1940 Statement of Principles and New York University's own Statement of Policy in Regard to Academic Freedom and Tenure require payment of one year's salary where a teacher with tenure is dismissed for cause and is not retained in service for a year after notice of dismissal, except that when the dismissal is for reasons involving "moral turpitude," such payment need not be provided. It could be presumed that, in this case, the University trustees concluded that Professor Bradley had been guilty of moral turpitude in failing to cooperate with an investigating committee of Congress. This position was alluded to in the hearings,

although it was never developed with any fulness. There was no formal finding of moral turpitude by either the Faculty Committee or the University Council. In a sense, it may be argued that Professor Bradley was dismissed under Charge One because he had improperly concealed his true reason for refusing to answer the questions of the Un-American Activities Committee, and had thus been guilty of moral turpitude. But the University never made a clear assertion that this was why Professor Bradley was being dismissed, and, in any case, such a motive on Professor Bradley's part would not have been inconsistent with an honest desire to challenge the authority of the Committee and to provide a basis for a clarification of important legal and constitutional issues by the United States Supreme Court. It was Professor Bradley's misfortune that the Court did not choose, in the 1940–1950 period, to make such a clarification. It did do so in 1957, and this perhaps demonstrates that Professor Bradley's course of action was not so seriously wrong as to warrant the conclusion that he had been guilty of "moral turpitude."

The action of New York University in defending itself against Professor Bradley's suit in the New York courts for severance pay and his salary during the period of his suspension cannot, from the lawyer's point of view, be criticized. When a dispute reaches the law-suit stage, the defendant is obviously entitled to make as strong an argument in his own behalf as he can. But the disclaimer clause in the New York University Statement of Policy which denied that its tenure agreement with its teachers had a contractual status can, and should be, criticized. Since this clause is still present in the University Statement of Policy, it is discussed in the concluding section of this report.

II. The Burgum Case

On October 13, 1952, Edwin Berry Burgum, Associate Professor of English at the Washington Square College of New York University, testified under subpoena before the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate, which was investigating the administration of the Internal Security Act of 1950 and other security laws. He was questioned in public session by Senators Homer Ferguson and Willis Smith, having earlier appeared before the subcommittee in an executive session. Prior to his appearance before the subcommittee, Professor Burgum was advised by the chairman of his department to answer frankly and truthfully all questions put to him by members of the investigating committee. He stated that he would probably not answer questions which might bear upon his relationship to the Communist Party. A member of the University administrative staff therefore attended the public hearing.

Professor Burgum refused to answer the question "Have you ever been a member of the Communist Party?" and 14 other questions. He invoked the First and Fifth Amendments, giving as his reasons for not responding to the subcommittee's questions a desire to protect freedom of speech and to avoid giving answers that might tend to incriminate him. Only the Fifth Amendment reason was accepted by the subcommittee.

Within a matter of hours after his appearance before the Senate subcommittee, Professor Burgum received a telegram from the Chancellor of New York University, Henry T. Heald, suspending him from his duties at the institution. The full text of the telegram is as follows:

I regard membership in the Communist Party as disqualifying a teacher for employment at New York University, and believe it is the duty of every teacher to answer frankly all questions of a duly constituted committee of a state or federal legislature regarding his connection or former connection with that party.

Refusal of a teacher to state whether he is or has been a member of the Communist Party, when questions on this subject are raised by such a legislative committee, is a breach of his duty to the government and to the University.

Because of your refusal to answer questions before the United States Senate Internal Security Subcommittee regarding your connection or former connection with the Communist Party, I hereby suspend you from your duties at New York University pending appropriate review of this action upon your request.

The University continued Professor Burgum's salary payments throughout the period of suspension.

On November 13, 1952, Professor Burgum requested a hearing before the Board of Review of Washington Square College. At the same time, he addressed a strongly-worded public letter to his "colleagues," in which he defended his position, and bitterly attacked Chancellor Heald for having followed a "disastrous course." This letter was accompanied by a leaflet, *The Case of Professor Edwin Berry Burgum*. Professor Burgum also made public a "letter to his students," which, like the letter to the Chancellor, was polemical in tone. On November 24, Dean T. C. Pollock, of Washington Square College, recommended to the University Council that Professor Burgum's services be terminated because—

. . . in my judgment, Dr. Burgum is unfit to teach in New York University because of conduct unbecoming a teacher, in that:

1. He refused to answer under oath on October 13, 1952, when asked a number of questions by the subcommittee of the Committee on the Judiciary of the United States Senate to investigate the administration of the Internal Security Act and other Internal Security Laws. By refusing to tell the truth frankly in response to legitimate questions related to an issue of major concern to the American People which were

asked by a duly constituted agency of the United States Senate, he has exercised his legal right to avoid being a witness against himself in a criminal case, but he has violated an obligation of a member of the teaching profession who has the privileges of academic freedom.

2. He refused to tell the truth frankly in this connection not, in my considered judgment, because of his stated desire to uphold freedom of speech, but rather because of his fear of testifying to acts which would reveal the truth concerning the relation of himself and others to the Communist Party and subject him to criminal prosecution. Previous evidence which leads to this inference is:

a. He was reported to be affiliated with from thirty-one to forty Communist-front organizations by the Committee on Un-American Activities of the United States House of Representatives.

b. He has been identified as a member of the Communist Party in testimony given under oath.

The University Council referred the suspension and recommendation of dismissal for a hearing and a report to the twelve faculty-elected professorial members of the University Senate. This Senate Faculty Committee held eleven formal sessions between February 18 and March 6, 1953. The transcript of these hearings runs to 984 pages. As in the Bradley case, Dean Pollock had the assistance of Professor Arad Riggs, of the New York University School of Law. Mr. Martin Popper served Professor Burgum as his legal counsel. Professor Burgum testified in his own defense, although in the course of the hearings he declined to answer certain questions.

The Faculty Committee voted separately on the two charges. The vote on Charge One was: to sustain, 3; not to sustain, 9. The Committee's report stated:

Whereas no person may be forced under the constitutional government of these United States to incriminate himself and no member of the teaching profession should be denied the legal protection accorded to all citizens under the Fifth Amendment of the Constitution, the committee finds that the first change is not sustained.

On Charge Two, the vote was: to sustain, 9; not to sustain, 3. With regard to the second charge, the Committee's report stated:

Whereas the University has a civic duty to the free society of which it is an institutional part, and whereas a member of the teaching profession in our society may be expected so to conduct himself that his activities meet the tests of responsible exercise of his rights of academic freedom, both in the classroom and elsewhere, the Committee finds that the second charge is sustained; and further, this committee of his colleagues considers that the dismissal of Associate Professor Burgum for his abuse of his University position under the cover of academic freedom would not be inconsistent with the Statement of Policy in Regard to Academic Freedom and Tenure at New York University as specified in Section III, Articles 1–11 inclusive, pages 21 to 26 in the *New York University Faculty Handbook*.

Apart from these brief statements, the Faculty Committee's report to the University Council was not accompanied by a formal written opinion. Six of the twelve Committee members wrote individual memoranda which were made available to the Council. These varied in length, character, and point of view; no one of them spoke for a majority of the committee members on the case as a whole. As in the Bradley case, a memorandum by Professor Hollis Cooley provided the most systematic statement of a finding in Professor Burgum's favor; and one by Professor Charles Hodges provided the most fully developed statement of the case against Professor Burgum.

The Executive Committee of the University Council considered the report of the Faculty Committee on April 15, and voted to recommend to the Council—

(1) That the existing suspension of Edwin Berry Burgum and his deprivation of privileges and duties as a member of the faculty and associate professor in Washington Square College be and the same hereby are ratified and confirmed; and

(2) That Edwin Berry Burgum be and he hereby is removed and dismissed from the faculty of New York University without salary after the date of the passage of this motion by the Council.

Professor Burgum was notified that he would be given a further opportunity to be heard at a meeting of the Council. On April 27, he was present with his legal counsel and was heard. On April 30, the University Council voted to dismiss Professor Burgum with no further salary payment. The decision was not accompanied by a formal statement of the grounds on which it rested, or of the arguments supporting it. However, following the Council's decision, Chancellor Heald stated publicly:

A University is an assembly of scholars, dedicated to the discovery of truth and its dissemination. Academic freedom is essential to this process of discovering and disseminating truth. It constitutes the climate of freedom in which free minds can engage in free inquiry.

It follows that a university may, in the interests of maintaining academic freedom, inquire into the beliefs and associations of any faculty member who it has reason to believe is conducting himself in such a way as to violate his obligations as a scholar and teacher.

Refusal of a member of a faculty to answer questions put to him by his university in an effort to determine whether he is bound by commitments which violate his own academic freedom renders him unfit to continue in a position of educational trust.

In the case of Mr. Burgum, an elected Faculty Committee of his peers, in the face of such evidence and in the face of Mr. Burgum's continued refusal to clarify his position with respect to such commitments, found that he was unworthy of continuing as a member of the academic community.

By its action, the Faculty Committee reaffirmed the traditional obligation of faculty members to themselves and to the community to avow openly and honestly their beliefs and not to conceal relationships which could be inimical to the welfare of their profession, the university, and the public.

1. Procedures

As in the Bradley case, the procedures followed by New York University in dismissing Professor Burgum were in conformity, in their main outlines, with the requirements of academic due process. But again, the specific way in which the University handled its case against Professor Burgum requires careful evaluation at a number of points.

1. At the very outset of the case, the Chancellor of the University acted hastily in suspending Professor Burgum from his teaching duties. Suspension of a teacher, pending ultimate disposition of charges against him, should take place only where the reasons for proceeding against him "render it highly probable not only that he is unfit to continue as a faculty member but that his unfitness is of a kind almost certain to prejudice his teaching or research."[1] Invocation of the Fifth Amendment by a teacher, in the absence of special considerations, does not warrant the immediate decision to suspend that was forthcoming in this case. However, even if the suspension be regarded as proper, the wisdom of the Chancellor's public statement explaining and justifying the suspension may be questioned, since it stated a rigid, restrictive policy concerning certain of the central issues raised by the case. It would have been a wiser procedure, and seemingly entirely sufficient from the University's point of view, for the Chancellor merely to have announced that he was suspending Professor Burgum pending further inquiry into the matter. As already noted, Professor Burgum's salary was continued during the period of his suspension.

2. Professor Burgum, like Professor Bradley, was ill-advised to make public statements during the period between his suspension and the time of the Faculty Committee hearing. He may well have thought it necessary to reply to Chancellor Heald's public statement made at the time of his suspension, but he erred in undertaking to argue the merits of his position publicly so quickly and so vigorously. He had been suspended on salary, and he had no reason to doubt that he would be granted a hearing by the University before a proper tribunal. It is desirable during such a period of suspension that *both* sides refrain from arguing the case in public and thereby running the risk of compromising in some degree the integrity of the hearing that is to follow.

3. Two of the twelve members of the Faculty Committee might

[1] Report of the Special Committee, p. 66.

properly have disqualified themselves from participation in the Committee's final deliberations and findings. One was compelled by illness to miss all but one of the eleven sessions at which evidence was received. He did have access to the transcript of these hearings and he participated in the six deliberative sessions immediately preceding the Committee's ruling in the case. The other member missed all of the hearings and two of the deliberative sessions.

4. The Faculty Committee set no limitations on either side with respect to the interpretation of the charges or the relevance of evidence. The chairman of the Committee repeatedly refused to rule on objections raised by Professor Burgum's counsel, and stated that at the conclusion of the hearings the Committee would make its own decisions about the meaning and propriety of the two charges and the relevance of evidence thereto. This, as one member of the Committee stated in his memorandum, put an obligation on the Committee of "carefully sifting the evidence to determine its relevance to the charges." Since the Committee made no report, it is impossible to determine how well the Committee met this responsibility.

5. As in the Bradley case, the failure of both the Senate Faculty Committee and the University Council to accompany their rulings with formal opinions explaining and justifying the action taken is subject to serious criticism. The Faculty Committee made it clear that it rejected Charge One in its entirety on the ground that "no member of the teaching profession should be denied the legal protection accorded to all citizens under the Fifth Amendment. . . ." But, as will be seen, Charge Two was an ambiguous one, capable of widely differing interpretations. The Committee voted 9 to 3 to sustain this charge, but in reporting its findings to the University Council, it failed to make clear what it thought it was finding Professor Burgum guilty of. The failure of the University Council to explain its decision against Professor Burgum was an equally serious defect, for it is not even clear that the Council was confining its ruling, as did the Faculty Committee, to the second charge. For all that appears in the record or that was offered Professor Burgum as explanation of the adverse decision against him, the trustees of New York University may well have based their dismissal ruling on the Fifth Amendment issue, or, for that matter, on some other completely unspecified ground. As in the Bradley case, New York University dismissed a member of its faculty, with more than twenty years of service, without setting forth a clear, unequivocal reason for the action.

2. *Charges and Findings*

1. Professor Burgum's failure to answer the Senate subcommittee's

questions concerning Communist associations gave the University administration a valid basis for undertaking its own inquiry into his fitness as a teacher. But, as in the Bradley case, the administration failed to make clear that it was the facts behind Professor Burgum's refusal to testify, and not the bare fact of the refusal itself, that was relevant to the question of his fitness as a teacher. This difficulty is first encountered in Chancellor Heald's statement explaining Professor Burgum's suspension. This statement unequivocally asserted that membership in the Communist Party, and/or failure to answer the questions of a legislative committee concerning such membership, automatically disqualified a teacher for employment at New York University. Neither of these reasons for disqualification is consistent with the position taken by the American Association of University Professors that membership in the Communist Party or invocation of the privilege against self-incrimination, in and of itself, is not enough to justify dismissal of a teacher.

2. In the two formal charges brought against Professor Burgum by Dean Pollock, the University administration shifted its ground somewhat, but did not wholly abandon the implication of the Chancellor's statement that membership in the Communist Party or invocation of the Fifth Amendment automatically disqualifies a teacher. On its face, Charge One stated that a teacher must testify before a legislative investigating committee and "tell the truth frankly in response to legitimate questions related to an issue of major concern to the American people . . . asked by a duly constituted agency . . . ," and, further, that a teacher "who has the privileges of academic freedom" violates "an obligation of a member of the teaching profession" if he invokes the privilege of the Fifth Amendment. This is a clear assertion of the position that a teacher who invokes the Fifth Amendment has automatically disqualified himself for continuing membership in the profession. Even though this charge was not sustained by the Faculty Committee, the administration of New York University erred in making it.

3. The many difficulties arising out of Charge Two are alluded to in Professor Cooley's memorandum. He writes: "The charge is circuitous, complicated, hard to interpret at all and impossible to interpret precisely, ambiguous in that it may involve two or more charges or none at all, and vague to the point of 'concealment,' to appropriate a word much used in the hearing [by University officials]." Charge Two begins by asserting that Professor Burgum's "stated desire to uphold freedom of speech" was not his true reason for refusing to answer the Senate subcommittee's questions. It is true that the subcommittee expressly disallowed this ground as a legal basis for the witness's silence. But, having been allowed to invoke the Fifth Amendment, Professor Burgum could properly have had a desire to protect freedom of speech as a

collateral reason for remaining silent. And, as Professor Cooley puts it, "So slight an effort was made [at the University hearings] to show that this was not one of his reasons [for silence] that this part of the charge seems to be little more than a side remark." Charge Two then states that the real reason for Professor Burgum's silence was "his fear of testifying to acts which would reveal the truth concerning the relation of himself and others to the Communist Party and subject him to criminal prosecution." A university must charge something more than the bare fact that a teacher has correctly invoked the Fifth Amendment; it must charge that he does have something to hide and that this potentially incriminating evidence is relevant to his fitness as a teacher. Here New York University does charge a "relation . . . to the Communist Party," one that would subject Professor Burgum to criminal prosecution, and it states that "this inference" is supported by "previous evidence" showing that Professor Burgum was affiliated with from thirty-one to forty Communist-front organizations and was a member of the Communist Party.

There is more than a little ambiguity in this phase of Charge Two. As Professor Cooley says in his memorandum, Professor Burgum's relation to the Communist Party "might or might not be a harmful one." Is the reference in the charge to "criminal prosecution" merely a vague and loose suggestion that anyone identified with from thirty-one to forty Communist-front organizations and who is also a member of the Communist Party may find himself one day being prosecuted for some sort of crime? Or is the University suggesting that Professor Burgum's alleged Communist connections rendered him subject to imminent prosecution for a particular crime? And in any case what is the relevance of all this to the essential issue of Professor Burgum's fitness and integrity as a teacher? There are, of course, many ways in which a teacher's Communist connections might in some degree compromise his fitness and integrity. Some of these may be noted here: 1. His adherence to the Communist "line" may reveal a closed mind inconsistent with the scholar's honest and impartial use of facts. 2. There may be actual evidence of an attempt to use the classroom for Communist indoctrination of students. 3. There may be improper use by a teacher, in his outside activities, of his university connection to gain prestige for Communist causes. 4. There may be activity that is defined by law as criminal, such as conspiracy to teach or advocate the overthrow of government by force or violence. 5. Finally, the teacher, if he remains silent about his Communist connections, may do so in ways that involve him in dishonesty or deceit.

Specific evidence in any one of these directions would certainly be relevant to the issue of a teacher's fitness, although even then the

significance of such evidence ought to be carefully weighed in the light of the individual's total record as a scholar and a teacher.

Charge Two did not specify in advance in just which ways Professor Burgum's alleged Communist connections compromised his fitness and integrity as a teacher beyond the vague suggestion of a criminal prosecution. This deprived Professor Burgum of his right to specificity in the charges against him, and made the preparation of his defense difficult. This shortcoming in the University's handling of the case was rendered even more serious by a failure to clarify the nature of Charge Two at the actual hearings. Careful reading of the long transcript, the Faculty Committee's report, and the memoranda of individual committee members makes it clear that the charge remained vague throughout the many days of hearings, and was variously interpreted by Dean Pollock, Professor Riggs, and different members of the Faculty Committee.

Professor Arad Riggs, Dean Pollock's counsel, entered on the record a great number of exhibits establishing the supposed Communist-front affiliations. Most of these, Professor Riggs said, had been supplied by the House Committee on Un-American Activities. Dean Pollock also produced two witnesses who testified directly as to Professor Burgum's membership in the Communist Party. One of them, Manning Johnson, a former Party member who has appeared in a large number of proceedings as a government witness, testified that Burgum was known to him as a Communist because he was so identified in discussion among Communist officials. Herbert Philbrick, who had been an undercover operative for the Federal Bureau of Investigation, testified that, on the basis of his knowledge of Party organization, Professor Burgum must have been under Communist discipline to be—as he was—an editor of *Science and Society*. Philbrick claimed no personal acquaintance with Professor Burgum, and Johnson only a slight one, which Professor Burgum denied. But none of this evidence, if believed, went much beyond the point of proof of mere membership in the party or in "front" organizations.

Among the matters that appeared on the hearing record and which might be thought to show how Professor Burgum's alleged Communist affiliations bore on his fitness and integrity as a teacher were the following: 1. Testimony on behalf of the administration with respect to the tactics of Communists generally, especially on indoctrination in the classroom. But no direct evidence was offered suggesting that Professor Burgum had attempted such indoctrination. 2. Evidence that for several years officers of left-wing student organizations on the University campus had enrolled in Professor Burgum's classes. Professor Burgum rightly challenged the statistical weakness of this allegation. And, as

Professor Cooley observes, "The introduction of such dubious evidence . . . is surprising in view of the lack of any charge of misusing his classes." 3. Evidence having to do with Professor Burgum's part in conflicts between the student body and the administration. This was so vague and slight that it may be dismissed as trivial. 4. Evidence suggesting that Professor Burgum had improperly exploited his affiliation with New York University as a means of promoting and giving prestige to Communist causes. One member of the Faculty Committee specifically noted this in his memorandum as an example of "faulty tact and judgment." Another, in the course of the hearings, commented that the identifications with the University in Professor Burgum's outside activities did not seem to him excessive. Professor Burgum was undoubtedly active in a large number of organizations and enterprises, many of which were commonly regarded as radical or "communist." But little direct evidence was adduced at the hearing to show that he himself deliberately exploited his university affiliation in these activities beyond the point that most teachers would regard as normal and proper. On the other hand, some members of the Faculty Committee may have made a judgment adverse to Professor Burgum on this point, and if so it cannot be said that such a judgment was wholly unsupported by evidence.

If Professor Burgum's relation to the Communist movement, as Dean Pollock stated in the course of the hearing, was one of "following the Party line," little or no evidence was adduced to show that this had in turn robbed Professor Burgum of essential freedom and integrity as a scholar. Professor Cooley properly concluded in his memorandum that this aspect of the University's case against Professor Burgum never got beyond "the pattern-of-behavior" argument—in other words, a contention that *any* Communist teacher must have surrendered part of his freedom and integrity, rather than a specific attempt to demonstrate that Professor Burgum had actually done so.

In the end, the most substantial attempt by University officials to show that Communist connections had in some way compromised Professor Burgum's fitness and integrity as a teacher lay in the area of dishonesty and deceit.

In his statement before the trustees, Professor Riggs said, in effect, that the second charge was one of dishonesty, drawn with "due academic decorum." "It is intellectual dishonesty of the rankest sort," Professor Riggs stated, "to subscribe to or follow an ideology that prescribes a mental strait-jacket for all its adherents and at the same time piously to evoke the privileges of academic freedom and freedom of speech." Professor Hodges also emphasized the charge of dishonesty in his memorandum.[1] He drew from the transcript "a summary impression of legal subterfuge, semantic sparring, evasions, if not downright lying on the

[1] See above, p. 40.

part of the petitioner." And the record, he concluded, "[showed] the petitioner to be no innocent bystander, just watching May Day parades in Union Square, but a highly intelligent participant in the perversion of those larger civic liberties of which academic freedom is a vital part."

In other words, the second charge may have been intended to make an allegation of dishonest representations by Professor Burgum both to the public, through the statements before the Internal Security Subcommittee, and to his colleagues, through the letter he circulated stating his case prior to the Faculty Committee hearing. *If* such dishonesty was established, we cannot say that it would not be an adequate ground for dismissal, or at least for some measure of discipline. But the proof of such a matter is difficult, since it involves inquiry into motives and state of mind. The evidence that was adduced was apparently intended to establish that Professor Burgum was a Communist or closely allied to the Communist Party; and from this an inference was suggested that he did not believe his own protestations about academic freedom. The span of such an inference, even if it were firmly supported in proof of Communist connections, would fall short of affirmatively demonstrating Professor Burgum's subjective personal dishonesty.

4. The vagueness of Charge Two and the varying interpretations placed upon it by different participants in the proceedings raise a question as to whether, before an adverse judgment against him resulted in dismissal, Professor Burgum was entitled to a reformulation of the charges and an opportunity to be heard on the new charges. The six memoranda submitted to the University Council by members of the Faculty Committee supply unmistakable evidence that the two charges, whether considered individually or in combination, were differently interpreted by members of the Committee. One of those who recommended dismissal emphasized, to the exclusion of all else, the conclusion "that Dr. Burgum had not told the truth." Another concluded that a "definite connection between Professor Burgum and the Communist Party had been established" which justified dismissal under that portion of the New York University Statement of Policy in Regard to Academic Freedom and Tenure that denies the protection of tenure to anyone who advocates the overthrow of government by force or who follows the dictation of any political party or group that presumes to dictate in matters of science or scientific opinion. A third held that "the second—and in effect key—charge . . . opened up the case on the clearly understood though broad grounds of academic turpitude—conduct unbecoming a teacher in his chosen community activities outside the University, yet deliberately identified with the University for its prestige value."

We appreciate that the process of hearing and decision cannot undergo endless revision, and that all the elements that enter into a decision

cannot be made explicit. On the other hand, we do not accept a suggestion that was laid before us that, once Professor Burgum's fitness was put in issue, a committee of his peers was free to make a general appraisal unconfined by specific charges or evidence of record. The Burgum proceedings, in our judgment, were defective in that the second charge was open to misinterpretation. The extent to which it was misinterpreted or misapplied cannot be precisely determined because of the failure of the Faculty Committee to give an adequate explanation of its recommendation, and the failure of the University Council to give any explanation at all. Under these circumstances, the failure of the Faculty Committee to insist upon a clarification of Charge Two or impose any limitations on the evidence adduced in support of the charge, a latitude which might have been harmless if this critical charge had been narrow and clear, was also probably injurious to Professor Burgum.

5. Professor Burgum's refusal to answer certain questions at the Faculty Committee hearings is a complicating factor in the case. With respect to the all-important issue of the corrupting influence of his allegedly Communist connections, Professor Burgum did state unequivocally at the hearing: "I deny that I have ever used the classroom to indoctrinate communism. I deny that I have ever committed espionage. I deny that I have ever been under the control of a foreign power or that I have surrendered my free will to any domestic organization. I have never advocated violent overthrow of the government, in the classroom or elsewhere. I have never followed dictation from any source either in my writings or my teaching." And Professor Cooley correctly asserts, "These denials were not seriously impaired by the University's evidence."

But when asked whether he had ever "recruited at the University, or as the result of University contacts, any person for the Communist Party," Professor Burgum replied, "I think you are now getting into an area that is beyond the ken of the University, and I should feel that it is inadvisable to answer that question one way or the other." He also refused to answer questions about his views on the Soviet Constitution and on the Moscow trials of 1937. Professor Burgum's chief justification for his silence was that his political views and activities were irrelevant to the issue of his academic fitness and integrity—in other words, that the Faculty Committee had no right to ask him questions about non-criminal activities and beliefs not directly connected with his teaching and research. As subsidiary grounds for refusing to answer some of the questions or to rebut some of the evidence, Professor Burgum's counsel asserted that his client would be in contempt of Congress if he answered the questions which he had refused to answer before the Senate subcommittee, and that there was no point in trying to rebut such testimony

as that of Johnson and Philbrick, because any rebuttal would probably be met by more such testimony, so that there would be no end to the proceedings.

This failure of Professor Burgum to be completely responsive to questions at the Faculty Committee hearings undoubtedly played a part in bringing about his dismissal. Professor Hodges, in his memorandum, observed that Professor Burgum had "conducted himself with something less than the honest effort at cooperation I would expect from a colleague who had nothing to conceal." And Chancellor Heald, in his public statement at the time the decision to dismiss Professor Burgum was announced, laid such stress upon the failure to answer questions as to suggest that this was the dominant reason for the dismissal.

Having elected to conduct an inquiry of its own following failure by a professor to testify before a public investigating committee, a university may reasonably expect the witness to testify, particularly at an executive session, concerning matters that are relevant to the issue of his fitness and integrity as a teacher. The questions concerning the Soviet Constitution and the Moscow trials, standing by themselves, were of doubtful relevance. But the Faculty Committee and trustees were entitled to take a very serious view of Professor Burgum's refusal to state whether he had ever used his University post as a means of recruiting persons into the Communist Party. On the other hand, a teacher with tenure does not have the burden of justifying his continuance. Rather, those who lay charges against him must support these charges by a fair preponderance of the evidence. If, as was the case here, the professor's announced position is that the charges pry into forbidden areas of personal belief and extra-curricular associations, his refusal to rebut the evidence against him or to quiet doubts about his suitability as a teacher leaves such evidence and doubts unchallenged; but his silence, whether based on constitutional grounds or an asserted ethical position, does not in itself establish his guilt. Moreover, Chancellor Heald's first public statement at the time he suspended Professor Burgum helped to undermine the University's normal and reasonable expectation that a member of its faculty would be completely candid with it. The Chancellor stated unequivocally that he regarded membership in the Communist Party as disqualifying a teacher for employment at New York University. The obligation of a teacher to disclose facts concerning himself that are of legitimate concern to the institution "diminishes if the institution has announced a rigid policy of dismissal in such a way as to prejudge the case."[1] In so far as the questions not answered concerned Professor Burgum's alleged identification with Communist causes, he had in effect

[1] Report of the Special Committee, p. 60.

been put on notice that the wrong answers would automatically result in his dismissal.

6. Like Professor Bradley, Professor Burgum received no severance pay. The question whether the dismissal was for reasons "involving moral turpitude" was not openly faced in this case either. If there was such an unannounced finding by the University Council, it lacked support because the reasons for dismissal were not specified. It is impossible to appraise the degree of turpitude in a dismissal on unstated grounds.

III. Academic Freedom and Tenure at New York University Today

Significant changes have occurred at New York University since the dismissals of Professor Bradley in 1951 and Professor Burgum in 1953. The University has a new President, who played no part in either of these cases, and there have been numerous changes in the membership of the Board of Trustees. On the other hand, the Vice President and Secretary, who at the time of the two cases were charged with "the supervision of the system of tenure," still holds this post, although the listing of his duties in the 1956 edition of the *New York University Charter and Bylaws* does not include the reference to the tenure system.[1] Similarly, the present Dean of Washington Square College is the man who brought the charges against Professors Bradley and Burgum.

As it was at the time of the two cases, the University's Statement of Policy in Regard to Academic Freedom and Tenure is generally an excellent one, and is in close conformity with the 1940 Statement of Principles, formulated by the American Association of University Professors and the Association of American Colleges. In January, 1956, the University Senate and the University Council of New York University approved the establishment of a "Board of Review," and of specified procedures for hearings in matters involving academic freedom and tenure. In general, the plan is the same one that was followed in the Bradley and Burgum cases. The Board consists of the most recently retired faculty representatives from each college or division of the University having membership in the University Senate.

A serious defect in the 1956 arrangement is found in the emphasis placed upon a *board of review* to which a faculty member, who has already been subjected to some sort of suspension or other disciplinary order, can appeal.[2] This perpetuates a defect in the University's pro-

[1] The reference to "the supervision of the system of tenure" is found in the *New York University Faculty Handbook* (April, 1955), p. 15.

[2] For example, Section "B *Jurisdiction*" reads, in part: "The Board of Review shall exercise jurisdiction under Article III, Section 8 of the 'Statement of Policy in Regard to Academic Freedom and Tenure' . . . , to hear the petition of a faculty member who believes that his right of academic freedom or tenure has been abridged or denied by the action of an administrative officer of the University."

cedures in tenure cases that was present to an unfortunate degree in both the Bradley and the Burgum cases, namely, an arrangement which allows administrative officers to suspend a teacher, make a public statement of findings against him that seriously prejudices his case on the merits, and then invite him to seek "review" of the adverse ruling if he so wishes. A sound procedural system in a dismissal case, one that fully protects the teacher's right to academic due process, brings the case to the tribunal that is to conduct the hearings and make the significant, and probably determinative, ruling, in such a way that the teacher's interests have not already been prejudiced by what is in effect an adverse decision against him by administrative officers. This is not to say that it is not the proper function of administrative officers to formulate charges against a teacher, and to adduce evidence in support of these charges at the subsequent hearing. Moreover, where there is reason to believe that a person is unfit to continue as a faculty member and this unfitness is of a kind almost certain to prejudice his teaching or research, the teacher may properly be suspended during the time of inquiry and decision. But there is a difference between these actions by administrative officers and the kind of initial action in a dismissal case that turns the chief tribunal into a board of "appeal" or "review" rather than an agency with opportunity and responsibility for making the initial judgment in the case. After all, a teacher with tenure is entitled to the benefit of the doubt in a dismissal case. Academic due process requires that administrative officers assume the burden of the proof in arguing his lack of qualification to continue as a teacher. There is real danger that a "board of review," undertaking to pass judgment on a teacher's "grievance" against administrative action, will proceed on the unconscious assumption that it is the teacher who must carry the burden of the argument. The present procedure at New York University is defective in this respect and should be changed.

The University's express disclaimer that the Statement of Policy in Regard to Academic Freedom and Tenure establishes a contractual relation between it and its teachers remains in effect and is subject to continuing criticism. Though the American Association of University Professors has never expressly disapproved such disclaimer clauses, they are contrary to the spirit, and probably the letter, of the 1940 Statement of Principles. Such disclaimer clauses are rarely included in formal tenure plans.[1] Since New York University chose vigorously to resist Dr. Bradley's effort to secure a court determination of his right to severance pay, the members of this committee are compelled to note with

[1] Clark Byse and Louis Joughin, *Tenure Plans and Practices in American Higher Education: A Study of Eighty Institutions*, Chap. 2 (unpublished manuscript).

apprehension the University's continued insistence that its Statement of Policy in Regard to Academic Freedom and Tenure has no legal standing. In a recent, and still unpublished, study of tenure policies in American higher education, we find impressive the following judgment of disclaimer clauses:

> At best, use of a disclaimer clause in a tenure plan creates uncertainty, for the teacher will not know whether he has acquired tenure protected by law until after the plan has been the subject of litigation. At worst, the disclaimer clause defeats legal enforceability. To include a disclaimer clause in a tenure plan is in effect to say to the teachers in the institution: "We recognize the importance of tenure in maintaining and promoting proper principles of academic freedom and therefore we announce the following tenure rules. But these 'rules' really aren't rules; they are merely an expression of present intention. We reserve the right, when the chips are down, to do as we think best. We are unwilling to subject our interpretation to review by an independent judiciary, the instrumentality established by society to adjudicate disputes. If this is unacceptable to you, you may go elsewhere."[1]

We express a hope that the Trustees of New York University will remove the disclaimer clause from the institution's "Statement of Policy" and thereby give full effect to the admirable provisions in that Statement respecting academic freedom and tenure.

ROBERT K. CARR,[2] Washington Office, (Political Science) *Chairman*
RALPH S. BROWN, JR. (Law), Yale University
EDWIN BURROWS SMITH (French), Wayne State University

[1] *Ibid.*
[2] At the time of appointment, Professor of Political Science at Dartmouth College.

The University of Michigan

On May 10, 1954, Dr. Harlan H. Hatcher, President of the University of Michigan, summarily suspended three faculty members without loss of pay. Earlier that day, they had refused to answer questions concerning present or past identification with the Communist Party, put to them by a subcommittee of the House Un-American Activities Committee at a session in Lansing. The subcommittee, of which Representative Kit Clardy of Michigan was chairman, had announced that it was investigating "Communist Activities in the State of Michigan." On August 26, 1954, after University proceedings which included hearings held by two faculty committees, two of the suspended men were dismissed without pay in lieu of advance notice, and the third, though reinstated, was censured.

These cases were considered in 1956 by a special committee of the American Association of University Professors, whose report (covering a number of other cases besides) was published, and was submitted to the Forty-second Annual Meeting.[1] This committee was unable to reach conclusions about the cases because of the incompleteness of factual information available to it, and it suggested that the Association appoint an investigating committee to seek further information about the cases.

We, the undersigned members of the committee appointed in accordance with this suggestion, visited Ann Arbor on November 29 and 30 and December 1, 1956. President Hatcher and Vice-President Marvin L. Niehuss accorded us courteous cooperation. We interviewed more than thirty persons and, through the assistance of University officials, were granted access to the transcripts of hearings and other relevant documents.

Dr. Mark Nickerson, one of the men dismissed, had been, since 1951, an associate professor in the Department of Pharmacology in the Medical School, with tenure. Dr. H. Chandler Davis had been, since 1950, an instructor in the Department of Mathematics in the College of Literature, Science, and the Arts. At the time of his dismissal, he held a two-year appointment, which had begun in 1953. The man reinstated with censure (hereafter referred to in this report as Dr. X, because he did not re-

[1] *Bulletin*, Spring, 1956, pp. 49–107. The section dealing with the University of Michigan is on pp. 89–92.

quest the intervention of the American Association of University Professors and did not release relevant documents to the committee) had been, since 1953, an assistant professor in one of the life-science departments in the College. At the time of the actions here under examination, he held a three-year appointment, which had begun in 1953.

In refusing to answer questions put to them by the Congressional Committee, all three men invoked the First Amendment of the Constitution of the United States. Dr. Nickerson, on advice of counsel, and Dr. X, also invoked the Fifth Amendment. After he was subpoenaed, late in 1953, Dr. Nickerson told the head of his department, the Dean of the Medical School, and officials of the University, that he had been a member of the Communist Party for a period which ended before his acceptance, late in 1950, of an appointment at the University of Michigan, effective in mid-1951. Similarly, Dr. Davis discussed, with the head of his department and with officials of the College and the University, what his course of action would be, but he did not tell them whether he was then or ever had been a member of the Communist Party. In refusing to answer questions, both men acted against the advice of the University officials whom they had consulted. It is understood that Dr. X had similar discussions with University colleagues and officials concerning the course of action he would take.

After President Hatcher summarily suspended the three men, he arranged for a standing committee of the University Senate to appoint an *ad hoc* faculty committee to advise him whether to reinstate the suspended men or to institute dismissal proceedings against them. This committee, after holding hearings, found Dr. Nickerson subject to censure, but recommended that he be reinstated (two of the five members dissenting); that Dr. X, though also subject to censure, be reinstated (one member dissenting); and that Dr. Davis be dismissed. The President then reinstated Dr. X and instituted dismissal proceedings against both Dr. Davis and Dr. Nickerson. Dr. Nickerson and Dr. Davis thereupon requested a hearing before the faculty committee provided for in the University Bylaws.

In their appearances before faculty committees, Dr. Nickerson and Dr. X discussed in detail their past Communist Party membership and activities.[1] Dr. Davis, explaining the principles which he said guided him, refused to discuss Communist Party membership and other matters which he termed purely political, but he did discuss what he termed nonpolitical aspects, relevant to his fitness to teach, of the matters he had refused to discuss at all as a witness before the Congressional Committee.

[1] Dr. Nickerson and Dr. Davis appeared before both the Ad Hoc Committee and the Bylaw Committee; Dr. X appeared before the Ad Hoc Committee.

No evidence adduced before these faculty committees, or before the Congressional Committee, tended to show that any one of the three had ever engaged, before his suspension, in unlawful or improper conduct. Each stated that he had never believed in or advocated or practiced the specific objectives which the committees indicated they attributed to Communists, and each said that he had never belonged to an organization which in his opinion engaged in such advocacy or practice.

The competence of no one of the three men as a teacher and research worker was ever questioned.

The second faculty committee unanimously recommended the reinstatement of Dr. Nickerson and the dismissal of Dr. Davis. President Hatcher, giving weight to an adverse recommendation made by the Executive Committee of the Medical School, recommended to the Regents that Dr. Nickerson as well as Dr. Davis be dismissed. The Regents adopted the President's recommendations, unanimously in the case of Dr. Davis, and by a vote of seven to one in the case of Dr. Nickerson.

It is difficult to state precisely the grounds upon which the President and Regents of the University dismissed the two men because the proceedings were not centered throughout, as the University Bylaws provided they should be, upon a written statement setting forth "with reasonable particularity" the "reasons for the proposed dismissal." In explaining, after the dismissal of Dr. Nickerson had occurred, why he had recommended it, President Hatcher indicated (1) that it was "difficult to accept" Dr. Nickerson's statement that he had withdrawn from the Communist Party and his "disavowal of the illegal and destructive aims of the Communist Party," and (2) that Dr. Nickerson's "continued membership in the Medical faculty would be harmful to the School and may injure the reputation of the University as a whole."

Dr. Davis, we have concluded, was dismissed because he was believed to be a present member of the Communist Party, on the theory that present membership necessarily involves acceptance of illegal and immoral principles and methods of action. There may have been a secondary ground, namely, that, regardless of the principles Dr. Davis acted on in refusing to answer questions, he was found to have violated a duty of "complete candor" which he owed to the University. Dishonesty in asserting that his refusals were based on principle, which the faculty committees inferred from the refusals and gave as the reason for their adverse recommendations, was not a ground relied upon by the President or the Regents in the dismissal of Dr. Davis.

Failure to center the dismissal proceedings upon a single particularized statement of proposed reasons was only one of a number of departures from the procedures prescribed by the University Bylaws. Most important, Dr. Nickerson and Dr. Davis were either not given, or not

given soon enough to afford them the "reasonable time for necessary preparation," certain documents and records which they needed in preparing their cases.

We who served on the Association's committee are convinced, by our investigation, that the summary suspension of the three faculty members and the dismissal of Dr. Nickerson and Dr. Davis were inconsistent with the generally accepted principles of academic freedom and tenure.

I. The Summary Suspensions

Nothing was said about why the suspensions were deemed necessary, in the identical letters of suspension which President Hatcher had delivered by messenger to Dr. Nickerson, Dr. X, and Dr. Davis a few hours after their appearance before the Congressional Committee.[1] President Hatcher later said of his summary suspension of the three men: "I took the minimum action open to me under the procedures endorsed by the [University] Senate and approved by the Regents."[2]

This was a clearly erroneous interpretation of amendments to the University Bylaws adopted by the Regents on October 16, 1953. Nothing in the Bylaws, as amended, made suspension mandatory. In submitting the proposed amendments to the University Senate, the Joint Committee which drafted them said in its report[3] that it

> . . . recognizes that the administrative officials of the University have the power, *for good cause,* to suspend a faculty member . . . [Emphasis supplied].

And the minutes of the Senate meeting at which the Bylaws were indorsed show that when a professor asked "whether the President would feel required to write a letter and institute [dismissal] proceedings if a faculty member refused to answer questions before an investigating committee,"

President Hatcher replied that he could give no categorical answer since there are many varying degrees of flagrancy. He said that there have been instances in which failure to answer has not been considered to be a sign of disloyalty or to be adequate reason to question the person's fitness for a faculty position.

If refusal to answer questions put by a Congressional Committee does not always call for even an inquiry into a faculty member's fitness to

[1] The letters appear at p. 6 of the President's Report to the Senate; the press release, at p. 1996 of the Minutes of the College Faculty for 1954.
[2] President's Report to the Senate, p. 6.
[3] Page 3.

retain his position, it is difficult to understand how it can be viewed as making mandatory his summary suspension.

The "good cause" which the Joint Committee recognized to be necessary to make a suspension proper exists only when the reasons for proceeding against a teacher render it highly probable that he is unfit to continue as a teacher, and that his unfitness is almost certain to prejudice his teaching or research, or that the temporary continued performance of his duties in teaching and research would very probably threaten the welfare of students or of society. Our study of the record of the appearances of Dr. Nickerson, Dr. X, and Dr. Davis before the Congressional Committee[1] persuades us that no rational basis for reaching any of these conclusions existed. The only harm conceivably threatened was criticism or action hurtful to the University by state legislators and alumni and benefactors, which might have resulted if the University had adhered to the principles of academic freedom and tenure in a time of almost hysterical public reaction toward real dangers to national security. The Administration of the University, if it could not dissuade such critics, should have run the risk of suffering harm of this kind while its inquiry into the fitness of the faculty members was in progress, instead of seeking to avoid it by unjustified summary suspensions.

II. The Dismissal Procedure

The procedural deficiencies that occurred in these cases were almost wholly unfortunate and unintended consequences of praiseworthy attempts to ensure fair treatment for members of the faculty questioned by Congressional Committees. In 1953, the University Bylaws were amended to provide for an alternative procedure for handling such cases more expeditiously than the normal procedures allowed. After the suspensions in these cases had been ordered, it was recognized that this new procedure was unfairly "abbreviated." This led to a decision to establish an *ad hoc* committee to consider these cases, before the President reached a decision whether to institute dismissal procedures. Unfortunately, however, this resulted in an unauthorized blending of the normal, long-established procedure and the newly authorized procedure. This blending, coupled with the desire of the University Administration that the proceedings be as expeditious as those which the amendments to the Bylaws authorized, brought about unforeseen consequences which, we are convinced, constituted, when considered together, a failure to accord academic due process.

[1] Hearings before the Committee on Un-American Activities, House of Representatives, 83d. Cong., 2d sess., pp. 5329–5387.

1. The Alternative Procedures Authorized by the University Bylaws After Their Amendment in 1953

The 1953 amendments to the University's Bylaws authorized the President to initiate "abbreviated" dismissal proceedings in exceptional cases "if he feels the good name of the University is jeopardized."[1] Prior to the adoption of these amendments, President Hatcher, on January 9, 1953, had telegraphed Representative Harold Velde, Chairman of the House Un-American Activities Committee, assuring him "of our willingness to cooperate with you to the fullest extent" in an investigation of the University of Michigan which he had "read in the papers" was planned.[2] Thereafter, on May 11, 1953, President Hatcher called to the attention of the University Senate (as its minutes show) a statement on "The Rights and Responsibilities of Universities and Their Faculties," which had been adopted on March 24, 1953 by the Association of American Universities. The statement was signed by the chief administrative officers of the thirty-seven member institutions of the Association and was widely publicized. It was a generally conservative evaluation of the rights and obligations inherent in academic freedom, asserting that "present membership in the Communist Party . . . extinguishes the right to a university position"; that "above all, [the professor] . . . owes his colleagues in the university complete candor . . ."; that "He owes equal candor to the public"; and that "If he is called upon to answer for his convictions it is his duty as a citizen to speak out. It is even more definitely his duty as a professor."[3]

Following President Hatcher's action in calling attention to this statement, the University Senate voted to establish a joint committee "to study the issues raised by the A.A.U. statement . . . and to recommend procedures to be followed in case a member of this faculty should have his right to his University position questioned as a result of governmental investigation." This joint committee drafted proposed amendments to the Bylaws, which were approved on October 12, 1953, at a special meeting of the Senate, and were adopted by the Regents four days later.

The normal dismissal procedure, prescribed by Section 5.10 of the Bylaws, was left unchanged by the amendments. A new section, 5.101, specified the respects in which the normal procedure could be abbreviated in exceptional cases, but the alternative procedure was required to conform to the normal procedure "as far as applicable."

[1] Report of Joint Committee on Demotion and Dismissal Procedures (October, 1953), p. 3.
[2] President's Report to Senate, p. 3.
[3] An admirable analysis and critique of this statement by the Academic Freedom Committee of the American Civil Liberties Union was made public on September 15, 1957.

(a) *The normal procedure*

Under Section 5.10, a proposal to recommend to the Regents the dismissal of a member of the faculty is initiated by the dean, director, or executive committee of a school or college; initiation by the President of the University is not mentioned. Two faculty tribunals are provided for: The initial-hearing tribunal is a faculty committee in the school or college in which the teacher serves; the reviewing tribunal is a faculty committee at the University level, namely, the Senate Advisory Committee, a standing committee of the University Senate, composed of seventeen elected members.

Section 5.10 assures to a faculty member whose dismissal is proposed the following safeguards:

1. The initiating authority must state in writing, with "reasonable particularity," the "grounds for dismissal."
2. The faculty member is assured adequate time to study the charges against him, and to prepare to meet them, by a provision permitting him to wait twenty days after receiving this statement, before requesting a hearing.
3. He is entitled to "an opportunity . . . to appear in person for a hearing" before the initial-hearing tribunal.
4. The tribunal may consider only evidence made part of the record, and must set forth its conclusions and recommendations in a written report.
5. The faculty member, if the tribunal's recommendations are adverse, is assured adequate time to study the record and report, and to prepare his case on appeal to the reviewing tribunal, by a provision permitting him to wait twenty days after receiving copies of the record and report before requesting the Senate Advisory Committee to review the case.

The final stages of the normal procedure are these: The Senate Advisory Committee, to which the appellant must "state the particular conclusions or recommendations which he deems erroneous," is directed to "review the record, hear the parties concerned, and receive any additional evidence and prepare any additional record it deems desirable." It is then to "prepare its report dealing particularly with the grounds upon which the request for review is based. The report shall set forth the conclusions and recommendations of the committee, and copies of the report together with any additions to the original record shall be furnished to the faculty member. . . ." Copies of the complete record (including the reports of both faculty committees) must be furnished to the initiating authority and to the President, and "the President shall transmit to the Board of Regents for final action the complete record in the case together with his recommendations in writing."

(b) *The alternative "abbreviated" procedure*

The complete text of the new section added to the Bylaws in 1953 is:

Section 5.101. *Procedure in Exceptional Cases of Emergency Character:* In exceptional cases which threaten direct and immediate injury to the public reputation or the essential functions of the University, the provisions of Section 5.10 shall be followed as far as applicable, except that (1) in such cases the President of the University may initiate action and state in writing the reasons for the proposed dismissal or demotion; (2) he may in his discretion limit to a period of not less than five days the time within which a request for a hearing may be made; and further, (3) he may direct that the hearing shall be held before the Senate Advisory Committee, or a special committee of at least five members of the University Senate which the Senate Advisory Committee may appoint in its discretion. The Senate Advisory Committee shall fix the date for such hearing, allowing a reasonable time for necessary preparation. In case the Senate Advisory Committee cannot be convened promptly because of absence on vacation or other cause, such members of that committee as are in residence at the time shall act for the committee.

This new section sanctions three departures from the normal procedure prescribed by Section 5.10: It authorizes the President (1) to initiate dismissal proceedings himself; (2) to shorten the time available to the faculty member involved for the preparation of his case, by reducing the time within which he may request a hearing from at least twenty days to "not less than five days," plus whatever "reasonable time for necessary preparation" is allowed by the hearing committee; and (3) to eliminate the review-type hearing by the second faculty committee and to have the initial (and only) hearing held by the Senate Advisory Committee (or in its discretion a special committee of at least five persons selected by it from members of the Senate), instead of by a faculty committee at the school or college level.

It is important to remember that since Section 5.101 requires that "the provisions of Section 5.10 shall be followed as far as applicable," the new section did not do away with: (1) the faculty member's right to "reasonable particularity" in the statement of "the grounds for dismissal"; (2) his right "to appear in person for a hearing"; (3) his right that the hearing tribunal shall consider only evidence made part of the record; (4) his right to be furnished with a copy of the record and a copy of the tribunal's report containing its conclusions and recommendations; and (5) his right to have forwarded to the Board of Regents a complete record, and the President's recommendations in writing.

2. *The Procedure Followed in These Three Cases—a Blending, Not Authorized by the University ByLaws, of the Normal and Abbreviated Procedures*

In February, 1954, after it was known that members of the faculty had been subpoenaed to appear before the Congressional Committee, the Senate Advisory Committee appointed a Subcommittee on In-

tellectual Freedom and Integrity, consisting of five members of the Senate, "to be available to serve as the hearing body provided for in Section 5.101."[1] (This committee will be referred to hereafter as the Bylaw Committee.)

On May 13, 1954, the President, accepting a recommendation concerning procedure made to him by the Executive Committee of the College of Literature, Science, and the Arts, announced in a press release his decision that, before reinstating or recommending the dismissal of Dr. X and Dr. Davis, he would ask "the Special Committee of the faculty appointed to conduct hearings" "to evaluate all known facts and testimony and hold hearings if desired, then make recommendations to him."[2] The Bylaw Committee, however, informed the President that, as it construed Section 5.101, it was authorized to consider the cases only after he had decided to propose, and had proposed, dismissals. The President therefore asked the Senate Advisory Committee to consider appointing a "special committee to advise him in the further study and actions which would have to be taken."[3] A report by the Senate Advisory Committee states that on May 20 it proceeded to elect a Special Advisory Committee to the President (hereafter referred to as the Ad Hoc Committee), consisting of five members of the Senate. The report also states that the Senate Advisory Committee "specifically delegated to the . . . [Bylaw Committee, which it had appointed in February, 1954], as permitted by the Bylaw [Section 5.101], the responsibility *for hearing any appeals* that might arise." [Emphasis supplied.][4]

This use by the Senate Advisory Committee of the phrase "for hearing any appeals" was unfortunate. The Bylaw Committee's function, under Section 5.101, was to act as an initial-hearing tribunal. In a sense, the Bylaw Committee did have an "appellate" function; it was authorized to hear an "appeal" from the President's proposal of dismissal. But it was not authorized to review the action taken by another committee as, in the normal procedure prescribed by Section 5.10, a subcommittee composed of members of the Senate Advisory Committee was. Yet that is how the Bylaw Committee did function. It gave Dr. Nickerson and Dr. Davis a second hearing, of an appellate type. Unfairness developed when it based its hearing and its conclusions very largely upon the record of the hearing held by the Ad Hoc Committee, which record had not been made available to the two teachers.

[1] Report to Senate, September 23, 1954.
[2] Minutes of the College Faculty for 1954, p. 1998.
[3] President's Report to Senate, p. 7.
[4] Report of Senate Advisory Committee to Senate, September 23, 1954.

Dr. Nickerson and Dr. Davis had not been accorded, in the proceedings of the Ad Hoc Committee, the precedural safeguards which, in the normal procedure, Section 5.10 would have required that they be accorded by the initial-hearing trbunal. No statement setting forth, with reasonable particularity, proposed grounds of dismissal was furnished to the Ad Hoc Committee or to the suspended men; the suspended men were not given the opportunity to be present at hearings at which other witnesses testified; the record prepared was incomplete, for it did not include statements made to the Committee by government investigators; and copies of the records were not supplied to the suspended men to enable them to prepare for the appellate-type hearing which Section 5.10 provided for. The explanation doubtless is that the task assigned to the Ad Hoc Committee was merely that of advising the President whether to reinstate the suspended men or to institute dismissal procedures against them. But when the Bylaw Committee later relied upon the Ad Hoc Committee's proceedings as though that committee had functioned as the trial-type tribunal which Section 5.10 provided, it in effect deprived Dr. Nickerson and Dr. Davis of procedural safeguards assured them by the Bylaws and required by due process.

(a) *The proceedings of the Ad Hoc Committee*

The report of this committee[1] describes its activities:

(1) Appointed May 27, 1954, it first met on May 29, at which time the President read a four-page memorandum to it.[2] On May 30, the Ad Hoc Committee listened to a tape recording of the testimony of the three suspended men before the Congressional Committee. At its meeting on May 31, the President again read his memorandum, for the benefit of the three men, and the chairman, whom the Committee had selected, read a four-page statement setting forth, among other things, certain questions indicative of the lines of inquiry proposed. This was mailed to the suspended men the next day, June 1, with a suggestion that they submit written statements if they wished to do so. On June 2, the Ad Hoc Committee and the President conferred with Donald T. Appell, investigator for the Congressional Committee. At an unspecified time, the Committee interviewed "another government investigator."[3] No record was kept at any of these meetings; the chairman of the Ad Hoc Committee summarized what had occurred at them, for the record, at a meeting held on June 7. The suspended men were present only at the meeting held on May 31.

[1] Pages 1–12.
[2] This memorandum is set forth in President's Report to Senate, pp. 8–12.
[3] Report, p. 19.

(II) On June 7,[1] 8, and 9, the Ad Hoc Committee held four meetings. A record of these meetings was kept but was not made available to the suspended men. Vice-President Niehuss attended all four meetings, and President Hatcher, the second meeting; the suspended men were not present at any of them. These meetings were (1) with the Executive Committee of the Medical School and the head of its Pharmacology Department, concerning Dr. Nickerson;[2] (2) with the Executive Committee and the Associate Dean and the Assistant Dean of the College of Literature, Science, and the Arts, concerning Dr. X and Dr. Davis,[3] (3) with the Executive Committee of the Mathematics Department and four other professors from that department concerning Dr. Davis;[4] and (4) with the Executive Committee of Dr. X's department and another professor from that department concerning Dr. X.[5]

(III) On June 13, three members of the Ad Hoc Committee met with a member of the Physiology Department, "one of the persons mentioned by" the Dean of the Medical School "as having had fairly close contact with Dr. Nickerson." No one else was present. No record was kept, but a summary of what had been said was stated for the record at a later meeting of the Committee while Vice-President Niehuss, but not Dr. Nickerson, was present.[6]

(IV) On June 14, 15, and 17, the Committee held three meetings, with Dr. Nickerson, Dr. Davis, and Dr. X, in that order. Vice-President Niehuss attended all three meetings; President Hatcher attended the meetings with Dr. Davis and Dr. X, but did not attend the meeting with Dr. Nickerson. The Committee had told the suspended men that each could be represented by counsel or other person of his choice, but none was. Dr. Davis was accompanied by the chairman and one other professor from his department. Dr. Davis had submitted, on June 14, a written memorandum in response to the questions mailed him on June 1;[7] Dr. Nickerson had not. A record of each meeting was kept, but it was not made available to the suspended man involved before he was dismissed. The transcript of the meeting with Dr. Nickerson comprises 172 pages; that of the meeting with Dr. Davis, 106 pages; Dr. X has not released the transcript of the meeting with him.

(V) The members of the Ad Hoc Committee held several informal conferences during this period. The Committee "met with President

[1] Transcript I, pp. 2f, 14, 17f.
[2] Transcript I, 71 pages.
[3] Transcript II, 106 pages.
[4] Transcript III, 61 pages.
[5] Transcript IV, not released by Dr. X.
[6] Transcript V, pp. 2–6.
[7] Transcript VI, pp. 2–23.

Hatcher and Vice-President Niehuss . . . all day Saturday, June 19, for a general discussion of the problems presented by the three cases." On Wednesday, June 23, it met "for the purpose of formulating tentative conclusions." The first installment of the transcripts became available to the members of the Committee on June 23, the last on July 1. On June 24, the Committee told the President and the Vice-President of its conclusions, which were "tentative and exploratory only, and . . . subject to revision after a study of the transcript. . . ." It was then agreed that it would be desirable to aim at action by the Regents, if any should be required, at their next meeting, which was scheduled for August 6; that the Ad Hoc Committee would complete its work by July 10; that the President would then act promptly; and "that there would thereafter be time for a review by the . . . [Bylaw Committee], if this should be necessary. . . ."[1] The Committee's 52-page report to the President is dated July 13.

(b) *The proceedings of the Bylaw Committee*

The dismissal procedure specified in Bylaw 5.101 was initiated by President Hatcher when, on Tuesday, July 27, 1954, two weeks after the Ad Hoc Committee had made its report to him, he wrote letters to Dr. Nickerson and Dr. Davis, telling them that he had decided to recommend their dismissal, and that "Under the provisions of . . . Bylaw [5.101] you have five days from this date within which to file your request for a hearing" before the Bylaw Committee. (Section 5.101 provided that the President might *"in his discretion"* limit this period to *"not less than* five days." [Emphasis supplied.]) President Hatcher attached to his letter to Dr. Nickerson a copy of a recommendation that he be dismissed, made by the Dean and Executive Committee of the Medical School, saying: "This recommendation places your case also under the general provisions of Bylaw 5.10."[2]

On Saturday, July 31, four days later, Dr. Nickerson and Dr. Davis each wrote to the Bylaw Committee, seeking review.

[1] Report of Ad Hoc Committee, p. 11.

[2] The President was clearly mistaken in believing this. The Executive Committee of the Medical School had "met for extensive discussions with Dr. Nickerson" on May 24 and June 3 and a letter had been written on June 11, signed by the Dean for the Executive Committee, informing the President of these meetings, of the Committee's decision to recommend dismissal, and of its reasons. (President's Report to the Senate, p. 15.) In doing all this, however, the Executive Committee had not purported to act under Section 5.10 of the Bylaws, and the requirements of that section had not been complied with—no proposal of dismissal by an "initiating authority," and no statement in writing of "the grounds for dismissal," had preceded the meetings with Dr. Nickerson; Dr. Nickerson had not requested a hearing; no record had been made of evidence received. Moreover, if the proceedings had been

The Bylaw Committee held a hearing in Dr. Nickerson's case on Friday, August 6. A record was kept; the transcript comprises 101 pages. The Committee's 31-page report is dated Wednesday, August 11. On that day, August 11, it held a hearing in Dr. Davis's case. The transcript comprises 104 pages. The Committee's 15-page report is dated Monday, August 16.

At the hearing held in Dr. Nickerson's case on August 6, no one was present except the five members of the Bylaw Committee and Dr. Nickerson. Only he was questioned. In opening the hearing, the chairman of the Committee said to Dr. Nickerson:[1] ". . . it has been your privilege to ask for this appeal"; and added:

> I hardly need to say that none of us are experts on appeals, and our hope today is to amplify some aspects of the previous testimony [before the Ad Hoc Committee] that may not be altogether clear, and to take into consideration the specific statements made in the President's letter [of July 27] to you, especially the second amplified letter [of today, August 6].

Dr. Davis was accompanied, at the hearing held in his case on August 11, by the chairman of his department and two other professors from it. They were given an opportunity, in the latter part of the hearing, to make comments. No one else was present. In opening the hearing, the chairman of the Committee said to Dr. Davis.[2]

> . . . I will emphasize we are an appeal committee, an appellant [appellate] committee, not an investigating committee.
>
> . . . We have reviewed the previous hearing of the . . . [Ad Hoc] Committee . . . we have read the recommendation of the . . . [Ad Hoc] Committee. . . .
>
> . . . We do not propose, I think, to open new lines of questioning with you. We, I think, find some of the previous questioning and answering not altogether clear, and we may want to return to some of those questions and amplify perhaps the direction of what we take to be the intent of the question.
>
> * * *
>
> . . . I would suggest that if you like you begin by reacting to the report of the previous committee, the . . . [Ad Hoc] Committee. . . .

(*Footnote continued from preceding page*)

governed by Section 5.10, the President would not have been authorized to cut down to "not less than five days" the twenty days allowed the faculty member for requesting review. The chairman of the Bylaw Committee stated, in the Nickerson hearing that the Committee held on August 6: "I told Dr. Hatcher two days ago, that the Committee felt that it should receive this case under Statute 5.101 and not under Statute 5.10, and he agreed that if that was our feeling, that that was what we should do." (Transcript, p. 31.)

[1] Transcript, p. 2.

[2] Transcript, p. 2f.

Thus, at both hearings, the Bylaw Committee made it clear at the outset that it conceived the Ad Hoc Committee as a tribunal of first instance in the dismissal procedure, and conceived itself as an appellate tribunal reviewing the cases in large part on the records and reports made by the Ad Hoc Committee. The Bylaw Committee's reports show that its deliberations and conclusions proceeded upon this assumption. But neither Dr. Nickerson nor Dr. Davis saw, before his dismissal, the transcripts of the Ad Hoc Committee's hearings; neither saw that Committee's report in his case until a few hours before his Bylaw Committee hearing, too late to permit him to make adequate preparation for that hearing.

Members of the Bylaw and Ad Hoc Committees have expressed disagreement with the chief finding of this section of this report that an unauthorized blending of old and new dismissal procedures at the University of Michigan brought about unforeseen consequences which resulted in a failure to accord Dr. Nickerson and Dr. Davis full academic due process. They state further that the two dismissed teachers were heard *twice* by their colleagues in proceedings that represented a careful and honest attempt by members of the faculty and Administration to interpret and follow the University regulations correctly. But this Association cannot regard itself as bound by the actions of a local faculty where important issues of academic freedom or academic due process are involved. Professors, as well as administrators, can err in these matters. Here the desire to secure fair treatment to the accused professors is beyond question; but the fact remains that the procedure actually followed left much to be desired.

III. The Nickerson Case

We have concluded that the grounds on which the University authorities dismissed Dr. Mark Nickerson were either improper or unsupported by substantial evidence, and that he was not accorded academic due process in the dismissal proceedings. We have reached this conclusion after a careful analysis of the complete record furnished to the Regents, which we have read in the light supplied by the minutes of many meetings of the University Senate, by the reports of several faculty committees and many other documents, and by our interviews with more than thirty members of the faculty and the administration. We can keep the length of this report within practicable limits only by treating summarily matters which, because of the obligation we feel to justify our disagreements with the authorities of the University of Michigan, we should like to discuss in detail; we must content ourselves with citing many documents from which we should like to quote extensively.

1. The Record Obscure as to the Grounds of Dr. Nickerson's Dismissal

If, as the Bylaws required, the dismissal proceedings had been based throughout upon a written statement setting forth with "reasonable particularity" the grounds of the proposed dismissal, our task would have been an easier one.

The Bylaw Committee understandably found it difficult to determine precisely what the grounds were on which dismissal of Dr. Nickerson had been proposed. The two-page letter of July 27 to Dr. Nickerson,[1] in which President Hatcher stated his "present intention . . . to recommend" dismissal, was imprecisely worded in so far as it attempted to set forth his reasons; this part of the letter is set forth in a footnote.[2] Dr. Nickerson began his July 31 letter to the Bylaw Committee by saying: "Although the bases for . . . [the President's] conclusion are not entirely clear to me, I will answer what I believe to be the President's charges . . . ." It is therefore understandable that President Hatcher deemed it desirable to supplement his July 27 letter by a three-page memorandum on August 6.

In this memorandum, the President set forth a number of reasons for his proposal that Dr. Nickerson be dismissed. In stating his reasons, he in effect adopted (1) the memorandum in which he had outlined to

[1] President's Report to Senate, p. 20.

[2] After referring to Dr. Nickerson's appearances before the Congressional Committee, the Executive Committee of the Medical School, and the Ad Hoc Committee, President Hatcher's letter of July 27 continues:

> Your answers to their questions leave grave doubts as to your fitness to hold your present position of responsibility and trust, and have raised in my mind and in the minds of the University Committee serious concern about your integrity as a member of the teaching profession.

The letter then referred to the recommendations made by the Ad Hoc Committee and the Executive Committee of the Medical School. Its next paragraphs are:

> You have refused to answer pertinent questions put to you by a duly constituted legal body concerning your activities and affiliations with the Communist Party on the grounds that the answers might tend to incriminate you. Although you deny that you would overthrow the government of this country by force, you have vigorously asserted before the committees of your colleagues that you want it clearly understood that you hold the same views and beliefs now which you held while you were an active member and an officer in the Communist Party; and that, although you are not now an active Communist, you drifted away from your activities only because you did not have enough time to devote to them, and not because you were in disagreement with the aims, policies, and methods of the Communists. Under these circumstances it becomes difficult to accept your disavowal of the illegal and destructive aims of the Communist Party.
>
> These serious disqualifications which bring your case before me under the provision of Bylaw 5.101 become even more weighty when joined with the formal recommendation made to me by the Dean and the Executive Committee of the Medical School (copy attached) that you be dismissed because your continued membership in the Medical faculty would be harmful to the School and may injure the reputation of the University as a whole. This recommendation places your case also under the general provisions of Bylaw 5.10.

The rest of the letter informed Dr. Nickerson of his right under the Bylaws to have his case reviewed by the Bylaw Committee, and allowed him five days within which to file a request for a hearing by that Committee.

the Ad Hoc Committee at its first meeting, on May 29, the matters he wished them to inquire into, (2) the minority and majority reports of the Ad Hoc Committee, and (3) the letter of June 11 in which the Medical School had recommended Dr. Nickerson's dismissal. The transcript indicates that the Bylaw Committee made no attempt before or at the hearing to extract from these many documents a statement setting forth "with reasonable particularity" the grounds proposed for the dismissal of Dr. Nickerson. In its deliberations after the hearing, the Bylaw Committee did do this. The unanimous report which it made to President Hatcher on August 11 states, under the heading "Analysis of Charges,"[1]

. . . We have earnestly sought . . . to determine, as precisely as possible, the nature of the charges brought against Dr. Nickerson; . . .

It appears to us, after considering your letter [of July 27] to Dr. Nickerson, your memorandum [of August 6] to the . . . [Bylaw Committee], the testimony as a whole, and the conclusions of the . . . [Ad Hoc Committee], including the minority report, that the charges brought against Dr. Nickerson may be stated as follows:

1. Dr. Nickerson was in the past a member of the Communist Party.
2. Dr. Nickerson is at the present time a member of the Communist Party.
3. Dr. Nickerson remains a Communist in spirit, and repudiates no part of the Communist program or objectives.
4. Dr. Nickerson has given conflicting testimony concerning the time of his withdrawal from the Communist Party, and has been vague concerning the method and extent of his withdrawal.
5. Dr. Nickerson invoked the Fifth Amendment when asked by a duly constituted legislative committee to testify concerning his Communist Party activities, despite the advice of officials of the University that he should testify openly.
6. Dr. Nickerson, at the time he accepted employment in the University, signed the employment oath, and failed to disclose his past Communist Party activities.
7. Dr. Nickerson failed to disclose his past Communist Party affiliations to his Department Head, even though classified projects were under way in that department.
8. That even though the four foregoing items [the paragraphs numbered 4 to 7 above] do not in themselves constitute grounds for dismissal, taken in the aggregate they indicate a lack of integrity.
9. That the retention of Dr. Nickerson on the Medical School faculty would not be in the best interests of the Medical School or of the University.

We believe that no charge has been made that Dr. Nickerson has failed to be candid in his testimony before his colleagues on the Special Advisory [the Ad Hoc] Committee to the President, and we believe there is no justification for any charge of such a nature. This was the

[1] Pages 3 and 4.

unanimous opinion of the Special Advisory Committee to the President, including those who filed a minority report.

The record before us makes reference to Dr. Nickerson's bringing discredit to the University, his being disloyal to the University, and failing in his moral responsibility to the University. These potential conclusions from the specific acts set out above have been considered in our evaluation of the charges.

The last of the nine charges thus formulated derives from President Hatcher's references, in his July 27 letter to Dr. Nickerson and in his August 6 memorandum to the Bylaw Committee, to the letter of June 11 he had received from the Executive Committee of the Medical School. In that letter, dismissal of Dr. Nickerson is recommended because his refusal to answer the Congressional Committee's questions concerning his political activities and his unwillingness "now to make a public reply to them" have raised "doubts and suspicions" which

have weakened seriously the confidence of a large number of his colleagues in him, and have led to serious internal conflicts within the Department of Pharmacology. His failure to make a public declaration of the facts concerning his association with the Communist Party is harmful to the Medical School, and may injure the reputation of the University as a whole. This absence of confidence-inspiring candor reveals a lack of loyalty to the University, whose defense and protection he is now seeking.

For these reasons Dr. Nickerson's usefulness to this Medical School appears limited and, therefore, the Executive Committee recommends his dismissal.

After the Bylaw Committee unanimously recommended that Dr. Nickerson should not be dismissed (though it deemed a letter of censure warranted), President Hatcher said that he "felt compelled to concur in the recommendation of the Medical School that Dr. Nickerson should be discontinued as a member of that faculty."[1] President Hatcher explained that he had

read hopefully through the testimony taken by the . . . [Bylaw Committee], seeking to find some new evidence that might controvert that already presented. Not only was it not there to be found, but instead there appeared repeated reinforcements of previous evidence upon which the original recommendation had been framed.[2]

By "the original recommendation," the context shows, the President referred to his letter of July 27 to Dr. Nickerson and his memorandum of August 6 to the Bylaw Committee. In setting forth the letter of July

[1] President's Report to Senate, p. 23.
[2] *Ibid.*

27 in his report to the Senate, the President says that he wrote it "pursuant to these, and other considerations." The words "these . . . considerations" refer to fifteen paragraphs[1] which conclude thus:

. . . It is not thoughts but the definite fact of adherence or non-adherence to the present Communist organization which is the subject of inquiry.

The burden of refuting the inescapable inferences flowing from his admitted former membership and present refuge in the Fifth Amendment must necessarily rest on Dr. Nickerson.

There is a reasonable presumption that a relationship such as he had with the Communist Party and its activities continues in the absence of a clear showing of its discontinuance.

The University Senate indicated, in a resolution it adopted on October 5, 1954, after listening to President Hatcher's report, its belief that the President and the Regents had improperly given weight to the Medical School's recommendation that Dr. Nickerson be dismissed. This resolution, which expressed the Senate's regret that Dr. Nickerson's dismissal had been ordered despite the recommendations of both faculty committees that he be reinstated, is set forth below, in a footnote.[2]

[1] Report, pp. 18–20.

[2] WHEREAS, this University Senate recognizes both the legal responsibility and the moral obligation of the President and the Regents of the University of Michigan to make final decisions in matters of faculty tenure, the Senate believes that the long term interests of both the University and its supporting society are best served when such decisions reflect the considered opinion of the University Senate.

WHEREAS, the Senate believes that the President and Regents are entitled to know the opinion of the Senate on the broad issues involved in faculty tenure, therefore

Be it resolved:

1. that this Senate express its full approval of the general principles of intellectual freedom delineated in the report of the Senate Committee on Intellectual Freedom and Integrity [the Bylaw Committee] in the case of Dr. Nickerson, especially
   (a) "We believe that we speak for faculty and administration alike when we assert that so long as ideas do not extend beyond the pale of legality, or accepted concepts of morality, the great tradition of academic freedom requires their protection."
   (b) "Dismissal from the University faculty, particularly in the case of a faculty member with tenure, is consistent with the ideals of intellectual freedom only when there is substantial evidence of grave misconduct on the part of the individual concerned."
   (c) "This case involves matters of University-wide policy with reference to a subject which transcends departmental and college lines. It involves questions of the freedom to hold unpopular ideas. It involves questions concerning the relations between the faculty and legislative bodies. It involves the meaning of tenure and the obligations of candor to the University. These are matters in which no department, no school, no college, as such, has any peculiar competence. These, it seems to us, are matters which must properly be considered at the University level."
2. that this Senate express its satisfaction with the decision of the governing body of the University in the case of Professor. . .[Dr. X], and its regret that the decision in the case of Professor Nickerson was not in accord with the unanimous opinion of the special Senate Committee charged with reviewing this and similar cases.

The record thus leaves it uncertain why President Hatcher made the recommendation, adopted by the Regents, that Dr. Nickerson should be dismissed. The charges formulated by the Bylaw Committee surely include all possible reasons for his dismissal. In the following three paragraphs we discuss, and state our conclusion about, each of those charges:

(1) We believe that the President was strongly influenced by the recommendation for dismissal made by the Dean and Executive Committee of the Medical School, and that he gave great weight to their reason, which he stated in his July 27 letter to Dr. Nickerson thus: "Your continued membership in the Medical School would be harmful to the School and may injure the reputation of the University as a whole."

(2) The seventh charge formulated by the Bylaw committee was that "Dr. Nickerson failed to disclose his past Communist Party affiliations to his Department Head, even though classified projects were under way in that department." It seems clear that President Hatcher did not deem Dr. Nickerson's dismissal justified on this ground. He did not mention it in any of the documents, heretofore discussed, which might be viewed as together constituting his statement of the grounds on which he proposed Dr. Nickerson's dismissal; nor did he mention it in his fifteen-paragraph exposition of considerations which influenced him to decide to recommend dismissal, or in his report to the Senate after the dismissals. (In his August 6 memorandum to the Bylaw Committee, the President referred to Dr. Nickerson's "apparent inability to get clearance for work on government classified projects," but only as tending to cast doubt on his assertion that he had withdrawn from the Communist Party.)

(3) In all other respects, our investigation and the documents available to us (including the transcript of a hearing at which Dr. X's colleagues in the College were questioned about him) demonstrate that the case of Dr. Nickerson was indistinguishable from that of Dr. X, whose reinstatement the President recommended.[1] It is therefore diffi-

[1] The three-member majority of the Ad Hoc Committee stated in its report (Summary of Committee Conclusions, p. 2f.) its belief "that the case of Dr. Nickerson is not substantially different from the case of Dr. . . . [X], as respects matters relevant to the present inquiry. . . ." Professor Barker (internal medicine), who dissented from the committee's recommendation of reinstatement for Dr. Nickerson, concurred in a similar recommendation in Dr. X's case; Dr. Sherlock (civil engineering) dissented from both recommendations.

President Hatcher's discussion of Dr. X's case in his report to the Senate does not refer to the statement of the Ad Hoc Committee majority which we quote above. Our investigation convinces us that the President's account, except in so far as it refers to the recommendation of the Executive Committee of the College that Dr. X be reinstated, overemphasizes differences between the two cases. Two examples: (1) The President says of Dr. X (Report, p. 24f.) ". . .even the investigator who

(*Continued on next page*)

cult to understand how the President could have (a) believed that Dr. Nickerson had not withdrawn from the Communist Party before he accepted a post at the University of Michigan; (b) believed late in August what he had said in July, that it was "difficult to accept Dr. Nickerson's 'disavowal' of the illegal and destructive aims of the Communist Party"; or (c) deemed Dr. Nickerson's dismissal justified either (i) by his past membership in the Communist Party, or (ii) by his having invoked the Fifth Amendment (on advice of counsel) despite the advice of officials of the University that he should not, or (iii) by his having signed "the employment oath" (an affidavit that "I am not a member of any political party or organization which advocates the overthrow of our constitutional form of government"[1]) without disclosing his past Communist Party activities; or (iv) by these three "items . . . taken in the aggregate," or (v) by his "bringing discredit to the University, his being disloyal to the University, and failing in his moral responsibility to the University."

2. *Grounds for Dismissal of Dr. Nickerson Either Improper or not Supported by Substantial Evidence*

Some of the grounds upon which the recommendations of dismissal were based do not, under the generally accepted principles of academic freedom and tenure, justify dismissal. The others, we have concluded from our study of the transcripts of the records of the hearings, were not supported by substantial evidence.

(a) *Findings of past or current advocacy or practice of illegal or immoral Communist objectives or activities, or of present innocent membership in the Communist Party, are not supported by substantial evidence.*

Dr. Nickerson's dismissal may have been based upon the ground that he had in the past, or that he currently, advocated or engaged in

(*Continued from page 71*)

was responsible for issuing the subpoena said that to the best of his knowledge and belief Dr. . . . [X] did withdraw from the Communist Party and had not been in any way identified with it since he broke away from it in the late 1940's." The President does not refer to the statement in the majority report of the Ad Hoc Committee (p. 42) that Dr. Nickerson's "statement that he has not engaged in any Communist activities since coming to the University of Michigan is consistent with all that is known about him by the government investigators interviewed by this Committee." (2) The President does say (Report, p. 18) of Dr. Nickerson, but not of Dr. X, that his "claims of withdrawal from the Communist Party are not supported by corroborative evidence of any sort, and might, under other circumstances, be flatly contradicted. The date which he gave for his final 'drifting away'—1948—coincides with the approximate date when the Communist Party went 'underground' and it became the party line for members to conceal their affiliations." Dr. X told the dean of the College that his "withdrawal from the Communist Party . . . was a slow and gradual process," that "it is a little difficult to state just what date it happened," that "this was a gradual process in his own mind going on really since the end of the war." (Ad Hoc Committee Transcript II, pp. 12, 36f.)

[1] Ad Hoc Committee Transcript II, p. 51.

the illegal or immoral objectives or conduct commonly attributed to the Communist Party. If it was so based, the requisite findings of fact lacked support in the record, and in what our investigation disclosed. This is also true if the dismissal was based upon a finding of present membership in the Communist Party without knowledge or belief that it advocated or practiced such objectives and conduct. There was no basis for rejection of the Bylaw Committee's unanimous finding that[1]—

> Dr. Nickerson has been, but is no longer, a member of the Communist Party, and is not under the domination of the Communist Party. His Marxist views on economic and political matters may coincide in some respects with those of the Communist Party, but this does not establish Party membership. He has disavowed both illegal political aims and the use of illegal methods to achieve what may be legal objectives. There is no evidence of illegal activity on the part of Dr. Nickerson in the past or at present and he has denied this under oath before the Clardy Committee. We have found him candid and open, and willing to discuss any matter we deemed relevant. He impressed the . . . [Bylaw Committee] that he was honest in his answers, and we found him in no sense evasive.

President Hatcher may conceivably have rejected this finding because he accepted the view asserted in the 1953 Statement of the Association of American Universities that "invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position." But when, on May 11, 1953, President Hatcher had initiated, in the Senate, a discussion of the Statement of the Association of American Universities, the minutes show that the Dean of the University's Law School told the Senate that this part of the Statement should not be read literally, and that "if the professor does go forward with his proof in a candid and cooperative way, then the University should assume the burden of proving by the weight of all the evidence his unfitness to continue as a member of the faculty."

(b) *Neither past nor present innocent membership in the Communist Party would in itself justify dismissal.*

Dr. Nickerson admitted past membership in the Communist Party. We have already stated our reasons for concluding that a finding of current membership would lack rational support. Apart from this, the declared position of the American Association of University Professors since 1953 has been that neither past nor present membership would in itself justify the dismissal of a teacher who did not know or believe that

[1] Report, p. 29.

the Party advocated or engaged in the illegal or immoral objectives or conduct commonly attributed to it.[1]

(c) *Invocation of the Fifth Amendment would not in itself justify dismissal.*

It is inconsistent with accepted principles of academic freedom and tenure to regard the invocation of the Fifth Amendment by a faculty member under official investigation as in itself a sufficient ground for removing him. This position was set forth in resolutions adopted by the Annual Meetings of the Association in 1953, 1954, and 1955, and was reasserted in 1956 by the Special Committee on Academic Freedom and Tenure in the Quest for National Security. Also in 1956, in its opinion in *Slochower* v. *Board of Higher Education*, the Supreme Court of the United States said:

. . . We must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment . . . a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.[2]

(d) *Dr. Nickerson's having signed, when he accepted appointment at the University of Michigan, an affidavit of the "disclaimer oath" type, without volunteering the information that he had in the past been a member of the Communist Party, did not justify his dismissal.*

The affidavit read: "I am not a member of any political party or organization which advocates the overthrow of our constitutional form

[1] See resolutions adopted at the Annual Meeting of the Association in March, 1953 (*Bulletin*, Spring, 1953, pp. 91–95). See also the paragraph headed "Grounds of adverse action," in the report of this Association's Special Committee on Academic Freedom and Tenure in the Quest for National Security, *Bulletin*, Spring, 1956, pp. 57f. In *Wieman* v. *Updegraff*, 344 U. S. 183, 190f., the Supreme Court of the United States said in this connection: "But membership may be innocent. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

[2] 350 U. S. 551 (1956). Unfortunately, President Hatcher was misinformed about the nature and meaning of the Fifth Amendment privilege against self-incrimination at the time of these cases. At the meeting of the Senate on May 11, 1953, at which the President initiated a discussion of the Statement of the Association of American Universities, the Dean of the Law School, the minutes show, said that a professor, by invoking the Fifth Amendment, "has created the presumption that he is guilty of a crime." The President accordingly said in his report to the Senate, in explaining why he had rejected the majority recommendation of the Ad Hoc Committee and instituted a dismissal proceeding against Dr. Nickerson: "By taking advantage of the Fifth Amendment in the Congressional Committee hearings he necessarily took the legal ground that truthful answers to the Committee's questions would expose him to the hazard of a successful criminal prosecution. This stand is inconsistent with his subsequent assertions that he has never done anything illegal." In including this passage in the report he made to the Senate on October 5, 1954, after the dismissals, the President made no reference to the statement by the Bylaw Committee at page 14 of its August 11 report that "the Fifth Amendment may be properly invoked by the innocent under certain circumstances."

of government." Dr. Nickerson signed it on December 26, 1950. As the majority of the Ad Hoc Committee said,[1] "He was not asked about such [past] affiliations, if any." The Bylaw Committee concluded a three-and-a-half page discussion of this matter in its report by saying[2] that Dr. Nickerson's failure to make his past political history known to the University "demonstrates bad judgment" and "exposes Dr. Nickerson to just criticism but does not impugn his integrity so seriously as to justify his dismissal." We doubt very much that a judgment and recommendation so adverse to Dr. Nickerson was justified. We are certain that dismissal on this ground would be inconsistent with the accepted principles of academic tenure and freedom.

(e) *A finding that, although classified projects were under way in the Pharmacology Department, Dr. Nickerson accepted an appointment therein without volunteering the information that he had in the past been a member of the Communist Party, would not justify his dismissal.*

We deem it unnecessary to discuss the important question, whether a university may properly give weight, in the selection and dismissal of faculty members, to decisions of governmental authorities granting or withholding "clearance" for work on "classified" projects. Uncritical acceptance by a university of nonacademic judgments based on nonacademic criteria involves an abdication which, surely, if it is ever proper, is proper only in exceptional situations. We do decide that, in the circumstance of this case, Dr. Nickerson's failure to volunteer information that he had been a member of the Communist Party, and might therefore be unable to get "clearance," did not justify his dismissal.

Dr. Nickerson testified[3] that, when he accepted an appointment at the University of Michigan, he did not know that there was any classified work going on in the Pharmacology Department and, not having applied for clearance, did not know whether he could get it. The report of the Bylaw Committee states:[4]

It should be noted, first, that the Department of Pharmacology at Michigan did not have a major development in classified research at the time Dr. Nickerson was brought into it and has not had since. Secondly, there seems to be no evidence that Dr. Nickerson has made any attempt to inform himself about the classified research that was in progress. The evidence is that he was completely isolated from it. In other words, Dr. Nickerson had relatively little reason to believe that his presence would seriously jeopardize the future of the Department because of his questionable security status.

[1] Report, p. 45.
[2] Page 18.
[3] Bylaw Committee Transcript, 16f.
[4] Page 19.

While Dr. Nickerson was at the University of Michigan, he rejected offers of two posts (as head of the Department of Pharmacology at the University of California at Los Angeles, and as vice-president in charge of research of the Burroughs Wellcome Company) because he concluded that he should not take these posts without getting security clearance, which he did not want and thought he might be unable to get.[1] The Bylaw Committee found that in so doing Dr. Nickerson displayed integrity. It reports (1) that the president of the company involved gave a report of the negotiations which "coincides in every detail" with that given by Dr. Nickerson, and (2) that the president said that "Dr. Nickerson was 'extremely honorable' throughout their discussions, making it clear to them that his clearance status was questionable, and giving them a full opportunity to assess the probable difficulties involved in his association with the company."[2]

(f) *The Medical School's recommendation that Dr. Nickerson be dismissed did not justify his dismissal.*

The letter written by the Dean of the Medical School on behalf of its Executive Committee, in which this recommendation was made, has already been referred to. President Hatcher, in his July 27 letter instituting the dismissal procedure, as we have said, referred to the recommendation as one that Dr. Nickerson "be dismissed because . . . [his] continued membership in the Medical faculty would be harmful to the School and may injure the reputation of the University as a whole." In his August 6 memorandum to the Bylaw Committee supplementing his reasons for proposing Dr. Nickerson's dismissal, President Hatcher treated the Medical School's recommendation as in itself a reason for dismissal, quite apart from the grounds upon which the Medical School based it. He said:

> Dr. Nickerson's position in the Department of Pharmacology and the Medical School has become untenable, in view of the unanimous recommendation of dismissal by the Executive Committee of the Medical School. . . . I give much weight to the recommendation of the Dean and Executive Committee of the Medical School.

Our study of the record and our interviews at Ann Arbor with the Dean and the Assistant Dean of the Medical School have convinced us that Dr. Nickerson's position was viewed as untenable, and that his continuance on the faculty was viewed as harmful to the Medical School, for two reasons only: (1) An agency which had supplied grants for

[1] Bylaw Committee Transcript, p. 18ff.
[2] Report, p. 20.

research to Dr. Nickerson had cancelled them after his appearance before the Congressional Committee. It was also thought that other agencies granting funds, and benefactors and alumni of the School, might withdraw their support unless the University dismissed Dr. Nickerson. (2) The head of Dr. Nickerson's department believed his continued presence in it to be undesirable because of other considerations, wholly unconnected with the avowed grounds for dismissal—considerations which clearly did not themselves justify dismissal, although they may have made it desirable for Dr. Nickerson to seek another post, as he told this committee he had said he would if he were reinstated.

The first reason is essentially the same one that the summary suspensions of Dr. Nickerson (and Dr. X and Dr. Davis) were founded upon. We believe that the University of Michigan was bound to incur the risk of the harm threatened, as a cost of preserving its traditional adherence to the principles of academic freedom and tenure.

The second reason for the Medical School's recommendation lacks substantial support in the record. In his July 31 letter, seeking a hearing before the Bylaw Committee, Dr. Nickerson said:

> These conflicts far antedate the political problem and I believe stem almost entirely from an unreasonably autocratic operation of the department and from professional jealousy. The political problem appears to be involved only in so far as it provided the chairman with a weapon which he has used extensively both within and outside the University. . . .

Dr. Nickerson then, in eight numbered paragraphs, set forth "observations . . . that . . . will indicate the nature of the departmental problem."

The Bylaw Committee chose to "stay out of the Medical School situation as much as we can."[1] In its report, the Committee said:[2]

> . . . facts in the record relating to internal administration of the Medical School . . . do not, and should not, play any part in the decision. We may add that if the departmental strife, the existence of which appears to be apparent from the record, is to be considered a significant factor in these proceedings, we would want the opportunity to make a further investigation with respect to its scope, causes, and pertinence.

Dr. Seevers, the Head of the Pharmacology Department, testified to the Ad Hoc Committee[3] that before "recent occurrences" he had had difficulties with Dr. Nickerson which did not "bother" him, but which he "felt . . . in retrospect . . . [showed that Dr. Nickerson was] fundamentally dishonest and lack[ed] the integrity that I would expect."

[1] Transcript, p. 30.
[2] Page 23.
[3] Transcript I, p. 60.

Asked to be specific, he never was. The Bylaw Committee believed Dr. Nickerson's testimony that he "did in fact turn . . . down" the offer (already mentioned) of the University of California at Los Angeles, rather than Dr. Seevers' testimony before the Ad Hoc Committee that this institution dropped Dr. Nickerson "just like that"; Dr. Nickerson gave the Bylaw Committee a letter from the Dean of the U.C.L.A. Medical School confirming his testimony.[1]

We agree with the Bylaw Committee in its conclusion[2] that "There is no evidence that any disciplinary action was contemplated by the Medical School by reason of any misconduct other than that which is related, directly or indirectly, to the Clardy Committee hearings. In short, there is no case at all in our opinion for departmental action which is not identical with charges which are set forth above, to which we have given extensive consideration."

All members of both faculty committees that questioned Dr. Nickerson agree that he discussed fully and candidly his past Communist Party membership and activities with them. Dr. Nickerson is still an intellectual Marxist; he believes that the Communist Party, when he belonged to it, did not advocate or engage in illegal or immoral ideas or activities; he does not accept the commonly-held view that the Party does this today; he was unwilling to make a public announcement of his position. He did not, when he was offered and accepted an appointment at the University of Michigan, volunteer the information that he had been a Communist and might not be able to get clearance to work on classified projects—information which he justifiably believed the University did not seek and did not need. Even those who condemn him concede that he is a highly competent teacher and research worker. His continuance on the faculty might have made the University lose support from agencies which supply grants, and from legislators, benefactors, alumni, and the public. On the other hand, the Bylaw Committee rightly thought applicable to this case the proposition that "The premature termination of a brilliant research career represents a serious loss to society."[3] Though Dr. Nickerson may not have been faultless in connection with internal strife which had existed in his department, disciplinary action against him for that reason had not been contemplated and was not justifiable.

3. Procedural Rights, Specified in the University's Bylaws, That Were Required by Academic Due Process, Not Accorded to Dr. Nickerson

The principles of fundamental fairness which the concept of academic due process embodies require that in a dismissal proceeding the professor involved be given adequate opportunity to know and to contest

[1] Report, p. 24.
[2] Report, p. 23.
[3] Report, p. 7.

both the reasons proposed for his dismissal and the evidence adverse to him. The second part of this report has shown that this was required by the Bylaws of the University of Michigan.

In Dr. Nickerson's case, the reasons proposed for his dismissal were not formulated "with reasonable particularity" until after the Bylaw Committee had held its hearing. When Dr. Nickerson appeared before the Bylaw Committee for his hearing on August 6, he had not seen the transcripts of the evidence taken by the Ad Hoc Committee, had heard none of the testimony adverse to him, and had been given the report of the Ad Hoc Committee only a few hours before. And yet the Bylaw Committee makes it clear in its report that, in deciding to recommend that Dr. Nickerson be censured, it relied largely upon the testimony adverse to Dr. Nickerson contained in the transcripts of the hearings held by the Ad Hoc Committee, and upon the majority and minority reports of that Committee. The President gave great weight to these documents when he rejected the unanimous recommendation of the Bylaw Committee that Dr. Nickerson be reinstated[1] and transmitted the documents to the Regents. It is thus apparent that Dr. Nickerson was not accorded an adequate opportunity to know and to contest either the reasons proposed for his dismissal or the evidence adverse to him, and that his case was seriously prejudiced as a result.

We deem it unnecessary to prolong this report by discussing in detail the propriety of several other features of the dismissal procedure. We wish to note, however, that we are convinced that it was unfair in the later dismissal procedure, to treat the Ad Hoc Committee's conclusions as if it had been an initial-hearing tribunal. Because the Ad Hoc Committee was not given such a function, it may have been unexceptionable for that Committee to exclude the suspended men from many of its sessions; to listen, off the record, to government investigators; and to discuss the cases with the President and Vice-President in the absence of the suspended men. But it is surely questionable whether it would have been proper for a first-hearing committee, in the normal procedure prescribed by Bylaw 5.10, to do any of these things. It is therefore clear that it was not proper for the Bylaw Committee, the President, and the Regents to give to the Ad Hoc Committee proceedings the significance which Section 5.10 contemplated should be given only to a first-hearing proceeding in which the procedural safeguards it prescribed were accorded to the professors involved.

IV. The Davis Case

As in the Nickerson case, we have based our conclusion that Dr. H. Chandler Davis was improperly dismissed by the University authori-

[1] See the quotation from President Hatcher's Report to the Senate set forth at page 69 above.

ties upon a careful analysis of the complete written record in the case which we have read in the light of many other relevant reports and documents and of our interviews with more than thirty persons at the University of Michigan.

1. Grounds for Dismissal of Dr. Davis Either Improper or Not Supported by Substantial Evidence

At the first meeting of the Ad Hoc Committee, President Hatcher read a memorandum[1] in which he suggested possible grounds for the dismissal of the three men. He said: "This is not an inquiry into the technical competency of the men," but into their "relation to or involvement in . . . [the Communist] conspiratorial movement. . . ." He quoted with approval, from the 1953 Statement of the Association of American Universities, the assertion that a professor "owes his colleagues . . . complete candor . . . [and] owes equal candor to the public." He then endorsed the A.A.U. Statement's proposition in the statement that—

> Since present membership in the Communist Party requires the acceptance of these principles and methods ["the fomenting of world-wide revolution as a step to seizing power; the use of falsehood and deceit as normal means of persuasion; thought control—the dictation of doctrines which must be accepted and taught by all party members"], such membership extinguishes the right to a university position.

The Ad Hoc Committee's report shows that it accepted this view that present membership was ground for dismissal.[2]

Although the Ad Hoc Committee based its recommendation to the President that Dr. Davis be dismissed, not on a finding of present membership in the Communist Party, but on "dishonesty" in asserting principle as an excuse for "lack of candor," the President did not mention such "dishonesty" in the letter he thereafter wrote to Dr. Davis, which formally instituted the dismissal proceeding against him. The President did say in this letter that the Congressional Committee's "representative has stated to us, that it possessed information concerning your membership in and associations with the activities of the Communist Party";

[1] Ad Hoc Transcript I, pp. 3ff.; President's Report to Senate, pp. 8ff.

[2] The Committee stated, on page 13 of its report, that it considered that its task was to determine how the refusals of Messrs. X, Nickerson, and Davis to answer the Clardy Committee bore upon the question of the integrity of the three men. The report then states: "If, despite such refusal, they should be willing to answer similar questions put to them by this Committee,. . .and if their answers should deny present Communist association or activities,. . .we would consider that we were obliged to recommend that their suspension be terminated, and that they should be reinstated. On the other hand, if they should. . .disclose present Communist association or activities, we would be obliged to recommend further disciplinary action or the termination of their employment, or, in certain eventualities, that a further investigation into the facts be undertaken."

and he referred to Dr. Davis's refusal to answer questions relating thereto put to him by both the Congressional Committee and the Ad Hoc Committee.[1] It is therefore obvious that the President deliberately chose not to adopt the ground of dismissal proposed by the Ad Hoc Committee.

The Bylaw Committee, after its hearing, recommended dismissal, basing its recommendation solely on the "dishonesty" ground which had been proposed to the President and which he did not use. In recommending dismissal to the Regents, the President did not state his reasons in writing.[2]

After the dismissals, the President made a report on the case to the Senate. After setting forth the memorandum he had read to the Ad Hoc Committee at its first meeting, the President said:[3]

> The case of H. Chandler Davis was distinctive. The line of questioning by the House Committee on Un-American Activities indicated a rather close and continuing involvement in the communist apparatus on the part of Dr. Davis.

The President then said that Dr. Davis took "the same attitude before the . . . [Ad Hoc Committee] that he had taken before the Congressional Committee at Lansing." Without referring at all to the Ad Hoc Committee's reason, he said that it had "unanimously recommended his dismissal." The President next quoted[4] the letter he wrote Dr. Davis on July 27 instituting the dismissal procedure. Then, he said[5] that Dr. Davis's "performance before . . . [the Bylaw Committee] was the same as that before the others"; next, he reported the unanimous recommendation of that Committee, but did not mention its reason. Finally, after expressing regret that members of the Senate had not received the report of the Bylaw Committee in the case, because Dr. Davis had objected to its circulation, the President said[6] that he concurred in its recommendation "and, after a full study of the documents, the Regents took action to dismiss Dr. Davis."[7]

[1] President's Report to Senate, pp. 12ff.
[2] Letter from Vice-President Niehuss, July 18, 1957.
[3] Page 12.
[4] Pages 12–14.
[5] Page 14.
[6] Page 15.
[7] The only relevant entries in the Minutes of the Regents (for August 26, 1954) are:

> The President reviewed in detail the procedure thus far followed in the cases of Messrs. Davis, Nickerson, and [X]. . . . After a lengthy discussion, the following actions were approved:
>
> Concurring in the recommendation of the President, the Regents ordered the dismissal of H. Chandler Davis, Ph.D., . . . effective at once.

We find inescapable the inference that Dr. Davis was dismissed because it was believed he was a present member of the Communist Party, and that present membership necessarily involved acceptance of illegal and immoral "principles and methods." There may have been a secondary ground, that whatever the principles Dr. Davis acted on in refusing to answer questions, he violated a duty of "complete candor" he owed to the University. Dishonesty in asserting that his refusals were based on principle, the reason given by the faculty committees for their adverse recommendations, was not a ground relied upon by the President in recommending, or by the Regents in ordering, the dismissal of Dr. Davis.

(a) *No finding of Communist Party membership, past or present, innocent or otherwise, or of illegal or immoral activities, was supported by substantial evidence in the record; moreover, innocent membership would not justify dismissal.*

Neither faculty committee found that there was any evidence that Dr. Davis was currently, or had been, a member of the Communist Party; or that he knew or believed that that Party advocated or practiced unlawful or immoral ideas or activities, or that he himself did. Our study of the record and our investigation convince us that the evidence would not have supported such findings.

The record shows that Dr. Davis was active in politics, and that he stood well to the left. He had antagonized the chairman of the Congressional Committee by participating in the publication, more than two years before, of a pamphlet critical of the Un-American Activities Committee. Government investigators connected with the Congressional Committee told the Ad Hoc Committee that "information in the possession of the" former Committee showed that Dr. Davis "was a member of a Communist undergraduate cell while a student at Harvard University [in 1942–1945], and that he has continued Communist Party affiliation and activities while here at the University," but did not disclose the sources of this information.[1] The Chairman of the Ad Hoc Committee said:[2]

I don't think any member of our Committee, as far as I know, would feel we are entitled to make a finding of current or past membership based only on what this man told us.

[1] Report, p. 19.
[2] Transcript II, p. 104.

In its report, the Ad Hoc Committee referred[1] to testimony of Dr. Davis that, in 1952, the State Department withdrew his passport, telling him that its reason was that an informant had said he was a Communist.

The record throws light upon the kind of information that sufficed in the early 1950's to lead governmental agents to conclude that Dr. Davis was a member of the Communist Party and that he engaged in "Communist activities" while at the University of Michigan. At Dr. Davis's hearing before the Ad Hoc Committee, the following exchange occurred:[2]

> CHAIRMAN SMITH: . . . I can indicate what some of these assertions [made to the committee by government investigators] are, and then I would like to know whether you will answer, and whether they are true.
>
> One is this, that in 1950 you participated in some sort of an official or formal condemnation of the Supreme Court decision in the Dennis case, a publication, I assume. Now these relate to acts on your part, not to opinions as such.
>
> DR. DAVIS: Are they acts that are conceived to be improper?
>
> CHAIRMAN SMITH: I suppose the totality of these acts might constitute the basis for an inference that you have been affiliated with a Communist organization, or conceivably they might not . . . .

Referring to all these statements made to it about information possessed by governmental agenies, the Ad Hoc Committee said in its report:[3] "We do not accept these allegations as proof. This would be unconscionable." We agree, and think that no reasonable person would disagree. Surely, accusation by unidentified persons cannot take the place of evidence. And here even accusation stopped short of suggesting that Dr. Davis had been guilty of any crime or any immoral conduct. The record is also bare of any intimation that he misused his classroom to promote his political views, or engaged in any other academic misconduct.

We discuss sufficiently in Dr. Nickerson's case the position taken by the American Association of University Professors in resolutions and committee reports that neither past nor present membership in the Communist Party would justify dismissal, in the absence of a supportable finding of knowledge or belief that the Party advocates or engages in illegal or immoral ideas or conduct.

(b) *A majority of this committee believes that it is unnecessary to determine whether the two faculty committees had a sufficient basis for findings that Dr. Davis was dishonest in asserting that his refusals to answer were based on principle.*

[1] Page 19.
[2] Transcript VI, p. 95.
[3] Page 19.

Dr. Davis explained the reasons of principle which guided him in refusing to answer questions he deemed political, in letters and memoranda he wrote to both faculty committees and in his answers to their questions. It is essential that his position be made clear. We therefore set forth the major part of a letter, considered by the Bylaw Committee, which Dr. Davis wrote on July 31, 1954, after the Ad Hoc Committee had recommended that the President initiate dismissal proceedings against him:

. . . What was my response to the questions of the . . . [Ad Hoc] Committee?

I was willing to answer questions pertinent to my integrity.

When questioned concerning certain specific charges of political chicanery that had been made against me by the Clardy [Congressional] Committee, I answered. Though these things had been none of Clardy's business, my honesty *is* my colleagues' business. I denied the charges; if desired, I can prove my denial. Do I lack intellectual objectivity? Do I improperly influence students? Do I favor force and violence? I offered to answer all questions of this sort, in as much detail as required. I think I made good on the offer; the President does not claim otherwise. And the Special Advisory Committee had said it required ***only*** answers relating to my integrity.

I did refuse to answer questions as to my political preferences.

What is so bad about that? Now I know very well there is a doctrine current in this country that one must say on demand, I am thus and thus far to the left (or better yet, far *from* the left). "The doctrine of compulsory self-labeling," it might be called.

The doctrine is pernicious. Many of its adherents admit its purpose is to facilitate punishment of anybody left of a certain line; some of its adherents admit that the line is movable. It certainly works that way in practice. Public intimidation has made many people terrified not merely of Communism, but of any thing they have been told might be construed as socialistic; many people have been so confused that they could not think of the subject if they dared. My countrymen have been some of the world's finest, most critical-minded, most contentious citizens; when I see them being cowed it alarms me. I rebel. The doctrine of compulsory self-labeling has been one major instrument of this sad change, so I reject the doctrine. I will not talk politics under duress.

Do my colleagues on the Special Advisory [Ad Hoc] Committee really insist on the doctrine? Presumably they would not want to punish me for my political position, whatever it might be. Do they nevertheless insist that I reveal my political position? Then they are unknowingly their enemies' accomplices. They should be as eager to see their error corrected as I am.

Some of you have objected, "But the Communist Party is *different*." The objection seems to be this (I will over-simplify it, but without distorting, I hope): "Members of the Communist Party are monsters, and your colleagues have a right to know if you are a monster, therefore your colleagues have a right to know if you are a member of the Communist Party." My answer is, in effect, "I deny that I am a monster. I promise

to refute any alleged evidence that I am. If then I am not a monster you must believe one of two things, or both: (1) I am not a Communist; or (2) some Communists are not monsters, in which case your syllogism collapses."

This answer is not evasive or gratuitously complicated. It is implied by my criterion, which is simple. For the Communist Party, Monstrous or not, is political; if a question concerning it amounts to both a question of morality and a question of politics, my criterion implies that I must split the question, answering the first part and not the second.

The reason I am especially careful to give no ground on the "$64 question" is that it has been made the central one by the Congressional inquisitors whom I oppose.

I think my stand is the best one; if you were in my place I hope you would take it too. But surely, even if you would prefer not to, you must realize it is not a dishonorable stand!

The President says that in taking it I disdain the University's policies and ignore its responsibilities. How have I disdained or ignored them? I feel that on the contrary I have cooperated fully and patiently with the officers of the University concerned with my case. I have exhaustively explained the principles governing my conduct, and I have assisted every inquiry into my integrity.

The basic policy and responsibility of the University is to advance learning by the fearless exercise of objective thought and observation. I think it is evident that I am far from disdaining or ignoring freedom of thought. In fact, I persist in what I consider the best defense of freedom of thought even when it is not expedient.

After Dr. Davis's dismissal on August 26, 1954, the Senate of the University of Michigan constituted a Committee on the Responsibilities of the Faculty to Society. Its report, dated April 22, 1955 (acceptance of which was defeated by a mail ballot, 317 for and 353 opposed), criticizes adversely the assertion in the 1953 Statement of the Association of American Universities that the teacher owes "complete candor" to his colleagues and the public, and asserts an opposed view, in the paragraphs set forth below. We believe that this Committee's view is generally consistent with principles of academic freedom and tenure, and that the position asserted by the Association of American Universities is not.

Candor is not defined in this passage, but it is clearly taken to mean both being honest or unevasive in answering questions and being frank or unreserved in answering them. Now certainly one should be honest or unevasive in replying to questions, for in this sense candor is a virtue and perfect candor an ideal. But it is also claimed that complete frankness, without any reservation, is always a professor's strict obligation, both as a citizen and as a teacher. Such "complete candor" is said to be his strict obligation, both as a citizen and as a teacher. This can hardly be correct, however, for *as a citizen* he has a constitutional right to be silent in certain cases. Nor can it be argued, as it seems to be, that because he claims the fullest right to speak, therefore he must speak. . . .

Others have, then, a right to honesty on a professor's part in reply to questions about his actions and convictions. But have they a right to expect complete self-revelation on his part? To say so is to say that, even in a free society, no one, or at least no professor, has a right to any privacy in his conviction or conduct. It is to imply that all silence is a sign of "clandestine or conspiratorial" activity, and this in turn is to assume guilt whenever innocence has not been proved. Perhaps a professor, because of his profession as a teacher and follower after truth, must speak out on some occasions when others may keep silent, but surely there are things about him which his colleagues and society have no right to insist on knowing, and which he may decline to tell them without thereby throwing discredit on himself or his profession.

What the proponents of "complete candor" must mean is that if a duly appointed body asks a professor questions which are pertinent to his fitness to continue in his profession, then he must answer them. But even this is doubtful as a hard and fast rule. It is, no doubt, true that he ought to answer such questions if other things are equal. But other things are not always equal, or may honestly not seem so to him, and then the important question concerns the ground of his refusal to answer. For it is incumbent upon him to explain why he feels that he cannot answer, and the question is whether his refusing to answer *on those grounds* is by itself presumptive evidence of unfitness for his profession.

Whether it is such evidence or not depends on the nature of the individual's ground or motive for not answering. If he sincerely believes, on careful reflection, that the investigative agency is invading his legal and moral rights and has no authority to ask its questions or that the questions asked are irrelevant to his fitness for an academic position, does his refusing to answer on these grounds, whether he pleads a Constitutional amendment or not, establish a presumption that he is unfit to be a professor? To say so is to say that a man who is wholly conscientious, and unquestionably competent both as a teacher and as a scholar, may yet be unfit for a university position, even if he is clearly reliable as a citizen. But in what way would such a man reflect on his profession even in keeping silent? Is it because he has not been candid? But has he not been? He did not answer the questions asked, but he did give a candid and sincere explanation of his reasons for not answering them.

Of course, if there is evidence of the man's unfitness as a teacher independent of the fact that he kept silent, this may establish a strong presumption against him, but then it is this and not his keeping silent that does so. It is only in this case, where independent evidence of unfitness or misconduct is before the investigating committee, that any burden of speaking can be said to rest upon an individual. Even in such a case, whatever burden rests upon him, it is not that of persuading the investigating body concerning the truth or falsity of the independent evidence. The near impossibility of proving a negative makes it imperative that the burden of proving the existence of grounds for disciplinary action be placed upon the accuser, unaided by inference from the silence of the accused.

The issue of the faculty member's obligation to disclose information to his own institution is a difficult one, to which considerable attention

has been given by this Association, and even by the United States Supreme Court in the past year or two. It now seems clear that if a teacher refuses to answer questions on the ground that, as a matter of honest belief or principle, he thinks they encroach upon his personal political and social views, this position should be respected and cannot, in itself, provide a substantial basis for his dismissal. On the other hand, his colleagues may conclude that his silence, instead of being based upon honest adherence to principle, is a means of withholding unfavorable information relevant to the issue of his fitness to teach. But where this latter conclusion is reached, the record should reveal this fact, and it should show that the hearing tribunal has found that the institution has successfully carried the burden of proof in demonstrating the improper motivation of the teacher's silence.[1]

In 1957, the United States Supreme Court reached a conclusion similar to that set forth in the preceding paragraph in its decision in *Konigsberg* v. *State Bar of California*.[2] In that case the California Bar Examiners had refused to certify Konigsberg to practice law on the ground that he had failed to prove that he was of good moral character and did not advocate overthrow of government by violent means. Konigsberg had declined to answer questions directed at finding out whether he was or ever had been a member of the Communist Party, insisting that such questions were an intrusion into areas protected by the First and Fourteenth Amendments to the Federal Constitution. The Court found that the refusal to certify him was arbitrary and discriminatory because there was no basis in the record for the decision to reject him. In particular, the Court found that Konigsberg's silence did not in itself constitute such a basis. This portion of the Court's opinion is worth quoting here:

> The State argues that Konigsberg's refusal to tell the Examiners whether he was a member of the Communist Party or whether he had associated with persons who were members of that party or groups which were allegedly Communist dominated tends to support an inference that he is a member of the Communist Party and therefore a person of bad moral character. We find it unnecessary to decide if Konigsberg's constitutional objections to the Committee's questions were well founded. Prior decisions by this Court indicate that his claim that the questions were improper was not frivolous and we find nothing in the record which indicates that his position was not taken in good faith. Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries

[1] See "Academic Freedom and Tenure in the Quest for National Security," *Bulletin*, Spring, 1956, p. 60.
[2] 353 U. S. 252 (1957).

which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted.[1]

The committee of inquiry does not undertake to determine whether the judgment of the faculty committees as to the honesty of Dr. Davis's position was right. We recognize that these committees had the benefit of hearing Davis's oral statements and observing his demeanor. If his dismissal had been predicated upon the committees' conclusion, it would be necessary now to determine whether a substantial basis for it existed; but as matters stand, we confine our consideration to the grounds of dismissal that were actually relied upon.

(c) *The Chairman of this committee believes that the two faculty committees did not have a sufficient basis for findings that Dr. Davis was dishonest in asserting that his refusals to answer were based on principle.* His statement here follows:

[Statement of the Chairman]

The report of the University Senate's Committee on the Responsibility of the Faculty to Society sets forth the test that should be applied here. I believe that Dr. Davis "did give a candid and sincere explanation of his reasons for not answering," before the Congressional Committee and the faculty committees, questions which he deemed political. It is beyond question that "his refusing to answer *on those grounds*" was justifiable in principle.

My study of the record persuades me that Dr. Davis's claim that the questions were improper was not frivolous and I find nothing in the record which indicates that his position was not taken in good faith. I think that therefore the two faculty committees could not properly draw unfavorable inferences as to his truthfulness, candor, or his moral character from his refusal to answer.

The Ad Hoc Committee

What its members and the President and Vice-President Niehuss said, at hearings of the Ad Hoc Committee prior to the one at which Dr. Davis testified, indicates how the Committee approached the question of Dr. Davis's "sincerity." There was discussion about what position "the University may publicly and socially take and defend"[2] and about whether the ground on which Dr. Davis based his refusals to answer questions "might be regarded as a justifiable ground or a ground not

[1] *Ibid.*, p. 269.
[2] Ad Hoc Transcript II, p. 83.

associated at all with the past subversion or present subversive activities" and whether "a person who is intelligent" could refuse to answer questions upon the principle invoked by Dr. Davis.[1] One Committee member said: "In the same way he might sincerely believe he is Napoleon Bonaparte or something like that, he is crazy."[2] When a member of the Executive Committee of the College told the Committee that Dr. Davis had impressed him as sincere but "unintelligent" in not answering questions, and that "an unintelligent person could be quite sincere," President Hatcher interjected this remark: "Well, members of the Communist Party are credited with sincerity, aren't they, Bill?"[3] Later that day, Vice-President Niehuss said that because "the Communists are completely underground, . . . when you face a man who simply adopts a cloak of secrecy, and there are charges that he is or may be a Communist, you have great difficulty in knowing whether you are facing a man who is following orders, or whether you are facing a man who is following principles."[4] That morning he had said, of a Communist publicly admitting membership, "that is a hypothetical case that you will never find."[5]

In its report, the Ad Hoc Committee revealed that its conclusion that Dr. Davis was "dishonest" in his reliance upon principle was based on his not having dispelled suspicion created by the accusations made against him. It said that "we have had to make some use of assertions made by government investigators concerning Dr. Davis's past and present Communist Party affiliations," which the Committee felt "can and should be used to help resolve a doubt concerning Dr. Davis's motivation and good faith in taking the line which he had used before his colleagues."[6] It sought to buttress this by referring to Dr. Davis's "demeanor" and by giving five examples of what it termed "convincing evidence of bad faith" and "a display of deviousness, artfulness, and indirection" in his responses to questions asked him at its hearing[7] I believe that the passages quoted should be read in context in the transcripts cited; when they are so read I believe that the unfavorable implications, which the Committee said, without explanation, it found in them, lack support.

These passages, and much else in the record, do reveal that Dr. Davis was argumentative and displayed some impatience with what seemed to his trained mathematical mind a lack of precision in the language and reasoning employed by members of the Committee in their

[1] *Ibid.*, p. 70.
[2] *Ibid.*, p. 70f.
[3] *Ibid.*, p. 72f.
[4] Transcript III, p. 48.
[5] Transcript II, p. 98.
[6] Report, pp. 18 and 19.
[7] Report, p. 18 and pp. 19–29.

questioning of him; it is apparent that he irritated members of the Committee. For example, the fifth "example"[1] has to do with an assertion made by the investigator for the Congressional Committee that Dr. Davis "had been on a program in Ann Arbor with Howard Fast and Paul Robeson." Dr. Davis said:

So far as I am aware, Paul Robeson has been in Ann Arbor only once during the time I was here, and Howard Fast wasn't in town at the same time, so neither I nor anyone else in Ann Arbor was part of the program with Howard Fast and Paul Robeson, so that can be easily proved.

A little later Dr. Davis, to the suggestion that the program might have been outside Ann Arbor, said:

In any event, it is not true. I don't mean to imply I would have been ashamed to appear on a program with Howard Fast and Paul Robeson, and as to being willing to appear on a platform with two such excellent Americans, I would be proud.

This perhaps reveals in a man, not quite 28 years old, argumentativeness and a willingness to antagonize members of the Committee by unnecessary "complete candor," rather than, as the Committee's report asserts, "deviousness, artfulness, and indirection." It is surely not, as the Committee viewed it, "convincing evidence of bad faith." It is difficult to see how the Committee could have viewed such evidence as outweighing the judgment which the Committee says was expressed to it by "[the] members of the Executive Committee of the Mathematics Department and the other Departmental members who met with this Committee, [who] were generally inclined to the view that Mr. Davis is a man of integrity and sincerity, whose conduct, in so far as known to them, has not been objectionable, and that his suspension should be lifted unless definite evidence of Communist activities were found."[2]

The Bylaw Committee

The transcript of the hearing of the Bylaw Committee shows that it approached the matter in much the same way the Ad Hoc Committee did. Thus, Dr. Davis was asked:[3]

How do you think a person who wanted artfully and deceitfully to avoid discussion of Communist party affiliations, could best do so under the guise of principle?

[1] Pages 28ff.
[2] Report, p. 16.
[3] Transcript, p. 61.

After his interlocutor had agreed that he meant, as Dr. Davis phrased it, "How do you know I am not lying?" Dr. Davis answered:[1]

> You know I am not lying because I have been here four years, all my friends on the faculty will tell you I am a person whose word you can trust, and you have no basis for thinking otherwise.

The interlocutor then asked:

> Would you concede your total conduct would be consistent with that of one who is artfully trying to avoid a discussion of his Communist Party affiliations?

and later:[2]

> Would not the adoption of that principle for the purposes of expediency, be a delightfully secure way to avoid it?[3]

In its report, the Bylaw Committee said that it did not attempt "the task of weighing the values of the principle [asserted by Dr. Davis] against the values to be achieved by insisting upon candor among the members of the University community," "because of our grave doubts that the principle is honestly invoked in this case." Later the Committee again made it clear that Dr. Davis must bear the burden of persuasion; it said:[4] ". . . Under the evidence before us, we do not find Dr. Davis's invocation of principle convincing." In adopting this approach and in reaching this conclusion, the Bylaw Committee was strongly influenced by the example set by the Ad Hoc Committee and by the Committee's "five examples" discussed above.[5] The Bylaw Committee cited what it asserted were similar examples, in Dr. Davis's testimony before it, of "unconvincing responses," "evasiveness and deviousness," and "lack of forthrightness."[6]

My careful reading, in context, of these additional "examples" has convinced me that they, like the others, did not constitute substantial evidence justifying a finding that Dr. Davis was not honest in his reliance upon principle. One illustration must suffice: "The Bylaw Committee cites, as "additional evidence of deviousness if not of outright dishonesty," Dr. Davis's assertion in his letter of July 31, 1954,[7] which the Committee notes the student newspaper had published: "I was willing to

[1] Page 62.
[2] Page 63.
[3] Page 10.
[4] Page 11.
[5] Report, pp. 10f. and 12.
[6] Pages 12ff.
[7] Set forth at page 35. above.

answer questions pertinent to my integrity." The Bylaw Committee says:[1]

> This statement was made after his hearing before the . . . [Ad Hoc] Committee. He could hardly have failed to be aware of the fact that he had not answered some questions which that Committee considered pertinent. The published statement is true only if it is interpreted to mean, "I was willing to answer questions which I consider pertinent to my integrity." Taken literally it is untrue, and it is, at best, calculated to deceive his colleagues concerning the extent of his cooperation with the Committee. It surely does not reflect his position before this Subcommittee.

Even out of context, the sentence (really a heading in Dr. Davis's letter) with which the Committee finds fault, hardly proves deviousness, let alone "outright dishonesty."

Any burden of proof that could properly be placed upon Dr. Davis to show that his silence was based on honest adherence to principle was satisfied when he explained fully and clearly why he refused to answer certain questions. Nothing in the record, and nothing disclosed by our investigation, affords support for the faculty committees' rejection of the testimony given by those who knew Dr. Davis best; before he was questioned by either committee, his colleagues in the Mathematics Department had testified that they believed "Mr. Davis is a man of integrity and sincerity."

[End of Chairman's Statement]

(d) *There was no evidence in the record supporting the dismissal of Dr. Davis on other grounds.*

Dr. Davis's competence as a teacher and scholar was never questioned. He had taken an interest in public affairs and had been active in the field of civil liberties. His sympathies and the causes he worked for were "left-wing." Misuse of his classroom or of his relationship with students, in the interest of his political ideas, was never attributed to him.

It was alleged that Dr. Davis had been, and currently was, a member of the Communist Party, but there was nothing in the record, and our investigation revealed nothing, in support of such a finding. Although Dr. Davis refused, on grounds of principle, to discuss this or other matters he deemed purely political, he disavowed both present and past adherence to, and advocacy or practice of, every one of the illegal and immoral objectives and methods commonly attributed to Communists;

[1] Report, p. 13f.

neither the record nor our investigation disclosed any support for a contrary finding. Dr. Davis's willingness to sign an employment affidavit disclaiming membership in "any political party or organization which advocates the overthrow of our constitutional form of government," though he expressed unwillingness to accept a position at an institution which requires the signing of an oath disclaiming membership in a specified party (the Communist Party), was consistent with his principles and with the position of this Association.

It is unfortunately true that in 1954 the University of Michigan would have risked loss of support if it kept Dr. Davis on its faculty. But we are convinced that temporary harm, if it occurred, would have been outweighed by enhancement of its stature and, in the long run, of its reputation even in nonacademic circles.

2. *Procedural Rights, Specified in the University Bylaws, Which Were Required by Academic Due Process, Not Accorded to Dr. Davis*

Dr. Davis, like Dr. Nickerson, was not accorded an adequate opportunity to know and to contest either all the reasons considered for dismissing him or the evidence adverse to him. His case was seriously prejudiced by this deficiency and also by the fact that he was not furnished with the transcripts which contained testimony favorable to him, given before the Ad Hoc Committee by his colleagues.

The ground upon which we think Dr. Davis's dismissal was based, present membership in the Communist Party, could and should have been stated with greater particularity. But we doubt that the failure to do this was prejudicial, for we believe that Dr. Davis knew that such was the ground of dismissal proposed. Dr. Davis was seriously prejudiced, however, by the action of the Bylaw Committee in treating as a charge against him[1] the Ad Hoc Committee's assertion that he had been dishonest in basing upon principle his refusal to answer its questions. The President, as has been shown, chose not to adopt this ground and include it in his July 27 statement of the reasons he proposed for Dr. Davis's dismissal. The report of the Ad Hoc Committee, in which this charge was first made, was furnished to Dr. Davis only "two or three hours" prior to his hearing before the Bylaw Committee.[2]

Despite the fact that Dr. Davis had had the report of the Ad Hoc Committee for only two or three hours, the chairman of the Bylaw Committee opened its hearing by suggesting that Dr. Davis "begin by reacting to" that report.[3] Dr. Davis told the committee that the "two or three hours . . . was enough. I have had time to go through it."[4]

[1] Report, p. 3.
[2] Bylaw Committee Transcript, p. 2.
[3] Transcript, p. 3.
[4] Transcript, p. 4.

We believe that Dr. Davis was mistaken about this; that he could have made a far better defense to the "dishonesty" charge if he had been furnished the report a week, or even a few days, sooner. He needed not only to know that there was such a charge, but also to be able to analyze the reasoning in the report and the evidence in the transcripts of the hearings held by the Ad Hoc Committee. Without these transcripts, in the few hours Dr. Davis had the report he could not even check the contexts from which the report had taken the "examples" that it asserted showed "bad faith" on his part. Nor could he learn that his colleagues in the Mathematics Department had testified concerning their belief in his integrity. The chairman of the Bylaw Committee seemingly assumed that Dr. Davis had been furnished the transcripts of all the earlier hearings in his case; at the end of the hearing the chairman asked: "There are no misstatements of fact in the previous record?" Dr. Davis replied that he had not "seen the transcript. . . ."[1]

We believe that the dismissal of Dr. Davis was improper because these procedural deficiencies constituted a denial to him of academic due process.

V. Salary After Dismissal

It is customary for colleges and universities to pay members of their faculties dismissed for cause, not involving moral turpitude, salary for a year after notification of dismissal, "whether or not they are continued in their duties at the institution." This practice is called for by the 1940 Statement of Principles for "teachers on continuous appointment." We believe that it is sound academic practice to follow the same policy in the case of a teacher dismissed for cause before the expiration of a term appointment, as Dr. Davis was. The dismissals at the University of Michigan were ordered by the Regents on August 26, 1954. It was then too near the beginning of the next academic year for the dismissed men to get appointments for that year, commensurate with their qualifications, at some other institution. It appears that the law of the state of Michigan did not preclude the payment of the year's salary.

We believe, therefore, that the University of Michigan departed from good academic practice and failed to do what justice required, when it refused to pay to Dr. Nickerson and Dr. Davis their salaries for the academic year following their dismissal.

In addition, Dr. Nickerson should have been paid the compensation

[1] Transcript, p. 102.

he had received every summer at the University of Michigan but did not receive in 1954 because of his suspension on May 10. The suspensions ordered were to be "without loss of pay." The letter, dated October 12, 1950, in which Dr. Seevers, head of the Pharmacology Department, in effect offered Dr. Nickerson his initial appointment at Michigan, contained this paragraph:

> My present thinking in the matter relates to an appointment as an Associate Professor with a total income in the neighborhood of $9000 on a twelve month basis. Actually, the appointment with the University is made on an academic year basis at a lesser figure, but supplementary sources of income, including summer session, etc., bring the total annual income to around the figure I have mentioned.

Perhaps technical arguments can be made that this did not propose that the University should be legally bound by Dr. Seevers' unqualified assurance to Dr. Nickerson that "supplementary sources of income, including summer session" would make his total annual income $9000; and perhaps arguments of the same kind can be made that Dr. Seevers lacked authority to bind the University. The fact remains that Dr. Nickerson was deprived of his usual summer compensation (which had sometimes come from sources other than the summer school faculty salary budget), solely because of an order of suspension which explicitly stated that it would not entail "loss of pay." We believe that justice requires, even if the law does not, that the University pay this amount to Dr. Nickerson for the summer of 1954 and for that part of the summer of 1955 prior to August 26, the anniversary of his dismissal.

VI. Developments at the University of Michigan Since the Dismissals

On October 5, 1954, after President Hatcher's report to the University Senate about these cases, the Senate adopted a resolution expressing its satisfaction with the reinstatement of Dr. X and its regret that Dr. Nickerson had been dismissed. Because Dr. Davis had not released the report made by the Bylaw Committee in his case, the Senate resolution did not refer to him.

Many members of the faculty of the University of Michigan disapprove (a) the principles, derived from the 1953 Statement of the Association of American Universities, which were applied in these cases, (b) the procedure followed, (c) the rejection by President Hatcher and the Regents of recommendations made by faculty committees in Dr. Nickerson's case, and (d) the University's failure to give severance pay to the dismissed men. These members of the faculty have tried to improve matters in these respects, but they have had little success.

1. The Senate Resolution Regretting the Dismissal of Dr. Nickerson

At the Senate meeting on October 5, 1954, a resolution was adopted by a vote of 314 to 274, expressing approval of "the general principles of intellectual freedom delineated in the report of the. . . [Bylaw Committee] in the case of Dr. Nickerson, especially." The preamble asserted the Senate's belief that "the long term interests of both the University and its supporting society are best served when. . . [decisions by the President and Regents in matters of faculty tenure] reflect the considered opinion of the University Senate." The last paragraph of the resolution expressed satisfaction with Dr. X's reinstatement and regret that the decision in Dr. Nickerson's case "was not in accord with the unanimous opinion of the special Senate committee charged with reviewing this and similar cases." The resolution is set forth in full in footnote 2, p. 70.

2. Other Developments

(a) *Faculty opposition to the Statement of the Association of American Universities.*

Faculty opposition to the Statement of the Association of American Universities first developed at a meeting of the University Senate held on May 11, 1953. President Hatcher, who had had copies of the Statement distributed, said: "Because the Conference of Presidents of the Association of American Universities is not a law-making body, the statement has force only as a general guide." The Senate established a Joint Committee "to study the issues raised by" the Statement, and to recommend changes in the University's dismissal procedure. The Senate then adopted a resolution stating "that the A.A.U. Statement does not look sufficiently outward to what is going on in society," and "strongly indors[ing]" a declaration by the 1953 Annual Meeting of the American Association of University Professors inconsistent with the A.A.U. Statement.

The report later made to the Senate by a joint committee, composed of three representatives of the administration and four elected representatives of the faculty, did not discuss the Association of American Universities Statement. Instead, this committee stated that it had concluded that "it would be unwise to attempt to formulate substantive principles in accordance with which decisions should be rendered by university tribunals in loyalty cases." President Hatcher was mistaken when he said, in the memorandum he read to the Ad Hoc Committee at its first meeting, that this joint committee had "reiterated in substance" the principles set forth in the Association of American Universities State-

ment, which he quoted at length.[1] The committee did include in its report several sentences in which it advised members of the faculty that they, "like other citizens, have a duty to testify fully and freely when subpoenaed by legal authority," and that anyone "who believes himself unable to" do so "should consult legal counsel as to his own individual problems," because refusal to testify on grounds of possible self-incrimination or irrelevancy of the questions to the matter under investigation "may lead to a citation for contempt or other serious legal consequence." President Hatcher was again mistaken when he said, in his August 6, 1954 letter to Dr. Nickerson, that "the University Senate, on May 13, 1953, had gone on record advising any person called to testify to cooperate." Even the joint committee's "advice" to members of the faculty fell short of this; moreover, the minutes of the Senate meeting (held, not on May 13, but on October 12, 1953) show that, because this part of the committee's report had not been considered by the Senate, there was objection from the floor to a motion to authorize publication of the entire report.

The resolution adopted by the Senate on October 5, 1954, regretting Dr. Nickerson's dismissal, impliedly disapproved the Statement of the Association of American Universities. The first two of the three quotations from the report of the Bylaw Committee which the resolution specifically approved (see footnote 2, page 70) were inconsistent with the principles asserted in the Association of American Universities statement, and applied in these cases.

At its October 5 meeting, the Senate adopted a motion requesting that it be convened in special session within a week. The special session was held on October 28, 1954 and, in accordance with proposals made by a special committee on agenda, the Senate established four committees to study and make recommendations to it on (1) the role of the faculty in matters of tenure; (2) the responsibilities of the faculty to society; (3) severance pay; and (4) appointment procedures and personnel records. The second committee was specifically asked to consider the following question: "Does the statement of the American Association of Universities [*sic*] reflect the judgment of the faculty? Does it conflict at all with the statement adopted by the American Association of University Professors?"

The Senate Committee on the Responsibilities of the Faculty to Society submitted a report, dated April 22, 1955, at a meeting of the Senate held on May 23, 1955. It is unfortunate that this notable document cannot be set forth in full. We have already quoted (pages 85–86 above) the paragraphs which criticize adversely the requirement of "complete candor" in the Statement of the Association of American Universi-

[1] President's Report to Senate, p. 9f.

ties. Though it finds "much . . . to applaud" in the Statement, the Committee says:[1]

its approach and its conclusions are in certain respects objectionable. (1) As has already been pointed out, it calls in too unqualified a way for complete candor from the faculty member, and is too ready to attribute the burden of proof to him if his conduct comes to public attention. (2) In both ways it tends to betray the principle that individuals should be regarded as innocent until proved guilty to which it itself subscribes in another place. (3) At certain points it merges legal and moral considerations in such a manner as to neglect the motive or the intention of the individual, as well as to condemn in advance any kind of conscientious objection, even though freedom of conscience has long been sacred in our history. (4) As a result it casts a shadow of authority and intimidation, quite unnecessarily, in precisely the region where such a shadow should least be allowed to fall.

The Committee proposed that its seven-page report, which it viewed as "in general agreement with the A.A.U.P. statement, though going farther at certain points," be adopted as a statement of principles by the faculty and administration. The Senate voted on the report by mail ballot; there were 317 votes for and 353 against its acceptance.

The Senate's rejection of this report, on May 23, 1955, seems to have ended efforts by members of the faculty to secure adoption at the University of Michigan of a statement of principles more consistent with the publicly stated position of the American Association of University Professors than is the Statement of the Association of American Universities.

(b) *Amendment of the University Bylaws governing dismissal procedures.*

At the meeting of the Senate held on October 5, 1954, it was recognized by both the President and the Senate that in the cases of Dr. Nickerson and Dr. Davis "weaknesses in. . . [the dismissal] procedures" had been revealed.

In the discussion, at the special meeting of the Senate held on October 28, of the motion to establish a Committee on the Role of the Faculty in Tenure Matters, the minutes report that a member of the Mathematics Department

reviewed the Davis case and contended that, though the grand jury function had been served by the Committee Advisory to the President [*i.e.*, the Ad Hoc Committee], there had been no trial, no careful sifting of

[1] Page 6f.

the evidence, and no impartial judge. He thus concluded that there had been a miscarriage of justice with penalties more severe than deserved.

The establishment of the Senate Committee on the Role of the Faculty in Tenure Matters led to the adoption by the Regents, on February 10, 1956, on the recommendation of the Senate, of a new Section 5.10 which superseded Sections 5.10 and 5.101 of the Bylaws as amended in 1953.

The new Bylaw distinguishes "cases involving matters concerning primarily [the school, college, or other] administrative unit in which the affected faculty member is employed" (which we shall refer to as "school cases") and "cases involving matters of general University concern" (which we shall refer to as "University cases"); and it authorizes the President to determine in which class particular cases fall, after consultation with the Senate Advisory Committee and the "executive authority" of the school involved. Cases of either kind may be initiated by the President or by the executive authority of a school. A written notice of "the nature of the matter," investigation of which is proposed, is required, rather than the statement "with reasonable particularity" of proposed reasons or grounds for dismissal required by the old Bylaws.

In a "school" case the executive authority is to prepare this notice and is to investigate the case. If the faculty member involved requests a hearing within ten days after receiving the notice, a hearing is to be held before the executive committee of the school or an *ad hoc* faculty committee appointed by its executive authority. A record is to be kept at the hearing and a written report made which, if dismissal or other penalty is recommended, must contain "a specific statement of the deficiencies or acts of misconduct on which the recommendation is based." The faculty member involved may secure a review of his case by requesting it within ten days after (1) receipt of this report or (2) receipt of a written notice (for which no time limit is prescribed) from the head of his school or college, stating (and specifying "with reasonable particularity" reasons for) disagreement with a recommendation favorable to the faculty member. If this review is requested, the University's Senate Advisory Committee or a subcommittee thereof, after giving at least ten days' notice, is to conduct a hearing, of which a record is to be kept. The report and recommendations must be approved by the full Committee. Within ten days after receipt of this report, the faculty member may file written comments with the President and the Executive Head of the school. The latter, within twenty days of receipt of the report, is to make his final recommendations, in writing, to the President, who is then to transmit the complete record and his own recommendations to the Regents.

In a "University" case, the Senate Advisory Committee is to pre-

pare the required written notice of "the nature of the matter" it proposes to investigate. Within ten days after receipt of this notice, the faculty member involved may request an "opportunity to be heard by the Committee." The "investigation and hearing" is to be conducted by a subcommittee, but the whole Committee is to make the report and recommendation. The executive authority of the school affected, but not the faculty member involved, is entitled to "be present or represented at all meetings of the Committee." A record is to be kept of the faculty member's hearing before the Committee. The report is to "contain a specific statement of the conduct on which the recommendation is based." The report and the complete record, including any recommendations made by the executive authority of the school, and any written comments filed within ten days by the affected faculty member and the executive authority, is to be transmitted by the President, with his own recommendations, to the Regents.

The Senate, in recommending to the Regents adoption of this new dismissal procedure, said that it did so "[in] the belief that the proposed amendment will eliminate weaknesses in the present Bylaws and will make less difficult the position of the President in situations where tenure is in question."[1]

We believe that the requirement by the old Bylaws of a recommendation of dismissal, before the prescribed hearings could be held, was undesirable and was wisely eliminated. But the new regulations are not without defects. Notice of "the nature of the matter" to be investigated does not safeguard the faculty member as much as does a statement "with reasonable" particularity of the grounds proposed for dismissal. Members of the Senate Advisory Committee who have not heard evidence are not only permitted, but required, to participate in decisions, whether the committee is the initial tribunal (in University cases) or the review tribunal (in school cases).

(c) *Faculty efforts to obtain a Bylaw providing salary after dismissal.*

On November 1, 1954, the Faculty of the College of Literature, Science, and the Arts adopted a resolution "that this body urges that the University pay Dr. Davis one year's salary." The Regents, on November 12, "concluded that the circumstances of these cases [Dr. Nickerson's as well as Dr. Davis's] do not warrant severance pay."[2]

The Senate, on April 22, 1957, after its committee on severance pay and the Senate itself had given the subject long consideration, recommended to the Regents the addition to the Bylaws of a new Section 5.010, authorizing severance pay. This section was so drafted that if cases

[1] Document (undated) headed "Proposed Amendment to Bylaws 5.10 and 5.101."
[2] Regents' Minutes, p. 244.

such as those of Dr. Nickerson and Dr. Davis should occur in the future, severence pay would be given the men dismissed. During the discussions which preceded proposal of the new section, the hope was expressed that it would be applied retroactively to Dr. Nickerson and Dr. Davis.[1] On May 25, 1957, after discussing the matter "at some length," the Regents "accepted this request [from the Senate, that Section 5.010 be adopted] for further study and action at a subsequent meeting of the Board."

Douglas B. Maggs (Law), Duke University, *Chairman*
John A. Kinneman (Sociology), Illinois State Normal University
C. Herman Pritchett (Political Science), University of Chicago

[1] Senate Minutes, October 28, 1954.

Reed College

The problem discussed in this investigating committee report essentially is whether it was proper for the Board of Trustees of Reed College, Portland, Oregon, to question a faculty member having tenure about possible Communist associations after a substantial indication of affiliation with the Communist Party during his service had arisen; whether the faculty member had a burden of disclosure to the Board of Trustees in that situation; and, if so, the weight to be given to his failure to discharge this duty in determining his fitness to continue as a member of the faculty. Narrowly stated, was Reed College justified in dismissing a faculty member who remained silent under such circumstances?

The action of the Board of Trustees of Reed College in dismissing Professor Stanley Moore and in retaining two faculty members (hereafter referred to as Professor X and Instructor Y), in August, 1954, after proceedings resulting from appearance by them before the United States House of Representatives Committee on Un-American Activities, was reviewed in the Report of the 1956 Special Committee entitled "Academic Freedom and Tenure in the Quest for National Security."[1] That Report expressed limited conclusions and left open the possibility of a further investigation into the merits of the dismissal. In April, 1956, Committee A on Academic Freedom and Tenure authorized an on-the-campus investigation into the incident to supplement the partial report. The undersigned were asked, late in 1956, to conduct such an inquiry and to prepare a report. The committee visited Portland February 28–March 2, 1957. During this period, interviews were held with the present President of the College, the former Chairman and certain members of the Board of Trustees, and members of the Faculty Council who had had contact with the matter.

I. Background

A. Appointment and Promotion to Tenure

Professor Stanley Moore joined the Reed College faculty as a member of its Department of Philosophy in the fall of 1948. In the prior summer he was interviewed at his home in California on behalf of Reed College by a professor of the College. The recollection of the partici-

[1] *AAUP Bulletin*, Spring, 1956, pp. 92–94.

pants to this conversation is that Professor Moore, not wishing to concede that political view or association was relevant, nonetheless stated that previously the departmental faculty of an Eastern institution informally had offered him a position; that the invitation was not confirmed by the administration of that institution because of an accusation of another teacher that he was a Marxist; that Professor Moore stated that if Reed College had similar criteria for appointment, he did not wish to work there; and that the interviewing professor assured him there was complete academic freedom at Reed. Professor Moore's recollection is that he said that the accusation made was that he was a Marxist in both theory and practice, or belief and action. It is agreed that Professor Moore did not state that he was an "active Marxist," or that he was a member of the Communist Party. The Reed College professor told the Association's investigating committee that if such facts had been developed in the conversation, he would have felt it necessary to report to the Faculty Council, although he considered political affiliation irrelevant. His impression is that he immediately discussed the appointment with the then President of Reed College, who was in California, and in the course of the conversation informed the President that Professor Moore was a Marxist. Shortly after the interview, Professor Moore was formally offered a position on the faculty.

Professor Moore apparently believed that the conversation at the time of his interview was discussed in the Faculty Council, but it appears that it was not. Doubtless, through informal channels of communication, at least some members of the faculty were aware at the time of the appointment that Professor Moore was a theoretical Marxist. The fact soon became a matter of common faculty knowledge, in any event, because Professor Moore was frank and open about his Marxist outlook.

In 1950 or 1951, a Reed College trustee had a conversation, during a golf match in Portland, with the chairman of the Philosophy Department at the University of California. To the extent that this conversation and ensuing events can be reconstructed from report and recollection, the philosophy professor asked how Reed College was faring with Professor Moore, stating to the trustee that Professor Moore had been a member of the Young Communist League at the University of California, and that he would not trust him in the State Department. He indicated further that while a large institution could afford variant views, and he probably would be willing to have him teach at the University of California, he wondered whether a small college could be so hospitable.

It appears that the trustee reported the substance of this conversation to then President Ernest B. MacNaughton, with the suggestion that he make an inquiry before Professor Moore acquired tenure at the College. Thereafter, President MacNaughton had one or more lunches with

Professor Moore, and later reported to the trustee that the latter was wrong about Professor Moore, whom he described as a "charming fellow and a Republican at heart." President MacNaughton reported his exchange with the trustee to the Faculty Council, indicating that the philosophy professor from California had died unexpectedly the day after he had made his comments to the trustee, and that while the President was thus foreclosed from discussing the matter with the source of the allegation, he had concluded that Professor Moore was a bright young man and a good American citizen. President MacNaughton apparently did not ask Professor Moore whether he was a member of the Communist Party. Professor Moore did not, at this or a later time, tell anyone connected with the administration or Board of Trustees that he was or was not a member of the Communist Party. There was no discussion in the Faculty Council as to his probable membership. There is no evidence that the matter was mentioned or discussed at a meeting of the Board of Trustees at that time.

At a somewhat later period, when Mr. Duncan S. Ballantine had become President of the College, the same trustee indicated to him that he had been informed that Professor Moore might be a Communist, and asked the President whether he was thoroughly satisfied to recommend indefinite tenure for Professor Moore, and suggested that the President would do well to investigate the matter. President Ballantine stated that he did not care to investigate, referring to the position of President James B. Conant, of Harvard University, that such activity would be harmful to the spirit of the academic community and should be left to the proper authorities. The trustee disagreed with this point of view. Like President MacNaughton, President Ballantine took no position as to what action would be appropriate if evidence were independently presented to the College showing that the allegation was correct.

In April, 1953, subsequent to the above discussions, Professor Moore received an appointment as full professor.

B. The House Committee Hearings

On March 16, 1954, a Mr. Charles Blodgett appeared before a Subcommittee of the Committee on Un-American Activities of the United States House of Representatives. Mr. Blodgett related that during a period in 1946–47, when he resided in Alameda, California, he was a member of the Communist Party and, as a staff writer for the *Daily People's World*, Oakland, California, attended closed meetings of the Political Affairs Committee of the Communist Party of Alameda County. His testimony was that a Mr. Stanley Moore attended a few of these meetings and was identified to him as an instructor in philosophy at the University of California, Berkeley, and as an official of the professional

section of the Communist Party of Alameda County. He described this Mr. Moore's appearance, and stated that he had learned that the Moore in question had taken a position at Reed College.[1]

Professor Stanley Moore was then in New York on leave of absence from Reed College, and on June 2, 1954, accompanied by his counsel, he appeared before a Subcommittee of the House Committee on Un-American Activities in Washington, D. C. He was questioned about the details of the Blodgett testimony. He was also asked, on the basis of stories appearing in the *Daily People's World,* whether he had lectured several times on Marxism and philosophy and other subjects at the California Labor School during the period 1947–49. Professor Moore described his educational and employment background and his service in the armed forces. He declined to answer any questions concerning the lectures, his political activities and affiliations, and whether he knew certain places and persons. He based his refusal on his right to freedom of speech under the First Amendment and on the ground that he could not be compelled to be a witness against himself under the Fifth Amendment.

On June 18, 1954, a Subcommittee of the House Un-American Activities Committee opened hearings in Portland, Oregon. On that date, a former student at Reed College testified that in 1947 he had joined a student organization, the John Reed Club of the Communist Party, at the urging of, among others, a fellow student at Reed College, and one Robert Canon.

Robert Canon had been employed by the Veterans Administration at Reed College. In 1948, he became Director of Admissions, and in September, 1953, also Dean of Students. He resigned from these posts on May 31, 1954. On June 19, 1954, Mr. Canon appeared before the House Subcommittee. He related that he had been a member of the professional club of the Communist Party, described as a small club composed of persons associated with Reed College. He testified that Professor Moore joined the club in September or August of 1948. His testimony was that the local Party leadership visited the club on occasion, and was concerned about the extent of "socializing" and lack of Party consciousness of the group. He related the procedure at the meetings, and the secrecy measures, dues, and collections, and stated that the members were kept isolated from the main body of the Communist Party and from the student John Reed Club, and did not identify themselves to students. He also testified, ". . . we were encouraged to do whatever we could to uncover latent interest among the students and to encourage it into party membership, but to keep ourselves protected

[1] Investigation of Communist Activities in the Pacific Northwest Area—*Part 1,* Hearings before the House Committee on Un-American Activities, 83d Cong., 2d Sess. 5973–74 (1954). For the citations in the next three paragraphs see *Hearings,* Part 1, 6037–50; Part 9, 6608–10; and Part 10, 6668–90.

as much as possible." He acknowledged such activity on the part of himself from the vantage point of the guidance center. Mr. Canon testified that he quit the Communist Party after the 1948 elections, and that he discontinued talking politics with people whom he had known in the Party and had no knowledge of their subsequent activities in that area. He testified that in his opinion there had been, during the time he was a full-time staff member at Reed College, "practically no Communist activity *per se* on the campus or associated with the College."

II. Reaction and Response to House Committee Hearings

A. Position of Professor Moore

After Professor Moore's appearance before the House Subcommittee in Washington, on June 2, 1954, he wrote the next day from New York, where he was on leave of absence, "An Open Letter to the President, Trustees, Faculty, Students, and Alumni of Reed College," which he also sent to Portland newspapers and other information media. Professor Moore justified his refusal to cooperate with the Committee on the grounds that it was abusing its authority, and that the questions invaded First Amendment rights of free speech and association. He pointed out that the Fifth Amendment may be invoked legitimately to escape prosecution without implying that a true answer would be an admission of guilt. He argued that the pleading of the Fifth Amendment is not an admission of professional unfitness and attacked the dismissal of teachers who invoke the privilege against self-incrimination. He wrote:

> There is a quick treatment and a slow. In the quick treatment the teacher is dismissed out of hand, . . .
>
> In the slow treatment the charges are investigated, that is, the trustees or the administrators conduct a hearing at which, like Congressmen, they question the teacher about his beliefs, associations, and political activities—not to mention those of his friends. *I believe that academic officials have no more authority to ask these questions than do Congressmen. It is an abuse of power for an employer to question the employee about his politics.* It is a travesty of justice to do so in an atmosphere created by pressure from influential demagogues. [Emphasis supplied.]

Professor Moore also discussed in his Open Letter the question of whether membership in the Communist Party is proof of professional unfitness. He argued that if the Communist escapes "the loss of intellectual independence which his membership supposedly entails," his Party membership has not made him unfit, and dismissal for mere membership is not justified. "If he doesn't escape it, his professional incompetence will be exposed to his colleagues, his readers, and his students. On this alternative, firing for membership is not necessary." He thought the fact was that some Communist teachers are competent and some not.

Professor Moore urged that he had dealt openly with Reed College, and that, although his politics might have led him into excesses, his past activities were open and known, and were a part of the record on which he had been promoted and given tenure. He noted that it is "sometimes claimed that a Marxist cannot justifiably defend himself in terms of such ideals as constitutional rights, free competition of ideas, and individual integrity," since he derides "these principles as mere flags and fig leaves of the bourgeoisie." Professor Moore rejected this claim as untrue, but stated that in any event the critical question was whether his conduct had been in conflict with his responsibilities as a faculty member. He acknowledged that he had put the College in a difficult position, but claimed that "the decision whether to submit or to resist [the causes which produced this attack] is within our control." He added, "I have made mine. I await yours."

In a second Open Letter, dated June 21, 1954, Professor Moore requested that if his conduct was to be investigated, he be given an open and public hearing. While it was his view that there was nothing to investigate, he recognized that the principles he set forth in his first Open Letter were not widely understood and accepted, and therefore "If a College investigation affords me the occasion to explain and defend these principles further, in full view of the public upon which my reputation ultimately depends, I shall welcome the opportunity." He stated his willingness to appear in person, but suggested that the most convenient method by which such a hearing could be conducted would be for the Board to send him written questions to which he would return written replies, both to be released to the public.

B. The Board of Trustees

During these days, the constituent parts of the college community were endeavoring to formulate policies which would guide them in the situation. On June 4, 1954 (prior to the Canon testimony), the Board of Trustees adopted the following resolutions:

> It has not been and is not the policy of the College to examine the conduct of any member of the faculty unless there is substantial evidence of misconduct or unless the good name of the College or the individual requires it.
>
> The Trustees will determine any case brought before them on its own merits, in the light of all relevant facts, and only after careful examination of the full facts, and in doing so will solicit the assistance and advice of the President and the Faculty.

In formulating its general policy, and at least in its subsequent deliberations, the Board took account of the 1940 Statement of Principles on Academic Freedom and Tenure. It also had an inquiry made into Harvard University's handling of somewhat similar cases. The Board understood the Harvard position to be that it was improper for

a faculty member to rely on the Fifth Amendment before a legislative committee. The Board agreed with the view, however, that such action would not justify automatic expulsion. It also understood the Harvard position to be that a faculty member who invoked the Fifth Amendment before a legislative committee owed the faculty and administration of his college a duty of disclosure concerning his past conduct in the area of the questioning.

C. The Faculty

The following resolution was adopted by the faculty of Reed College on June 1, 1954:

1. A teacher should be appointed on the basis of his teaching ability and his competence in his professional field, not on the basis of his race, nationality, creed, or religious or political belief or affiliation. Continuation of appointment and the granting of continuing tenure should depend upon a teacher's performance as a teacher. None of the factors excluded from entering into appointment should influence the continuation of appointment.

2. The central issue in considering a teacher's fitness is his own performance in his subject and his relationship with his students. The Faculty of Reed College opposes as contrary to democratic liberties any ban or regulation which would prohibit the employment as a teacher of any person solely because of his views or associations.

D. Preliminary Steps in Professor Moore's Case

On June 22, 1954, President Ballantine wired Professor Moore in New York, informing him that under the principles adopted by the Trustees on June 4, he had been instructed to initiate an inquiry with reference to Professor Moore's conduct as a faculty member. President Ballantine stated that, in order to determine the facts "fully and fairly and without prejudice," Professor Moore was invited to return to Portland at the College's expense to discuss the matter with the Faculty Council, the President, and the Trustees.

Professor Moore replied the following day, requesting clarification. He pointed out that he had tenure, and that an inquiry into his conduct would come under the provisions of the 1940 Statement of Principles of the Association of American Colleges and the American Association of University Professors. He requested (1) a written statement of specific charges, including characterization of each charge as indicating incompetence or moral turpitude, and (2) assurance that the proceeding would be conducted in accordance with the 1940 Statement.

Professor Moore sought the advice of the American Association of University Professors, and on June 29, 1954, General Secretary Ralph E. Himstead wired President Ballantine that he had advised Professor

Moore to return for the inquiry. The General Secretary expressed a hope that the inquiry would proceed according to the principles of Academic Freedom and Tenure set forth in the 1940 Statement, and invited consideration of pertinent resolutions adopted by the Thirty-ninth and Fortieth Annual Meetings of the Association.

President Ballantine wired Professor Moore, in response to the latter's request for clarification, that the decision whether to bring charges against him would be made at a regular meeting of the Board of Trustees on August 6, prior to which the Faculty Council, the President, and a Trustees' Subcommittee were making investigations "which include a completely informal opportunity for you to talk with these groups." The President indicated further that if charges were brought by the Board, Professor Moore would be invited to appear before the full Board "to give whatever evidence and answer whatever questions you may desire."

On July 16, 1954, Professor Moore wrote the President, declining to avail himself of the "informal opportunity" offered. He offered, however, to answer written questions submitted to him. In this communication, he drew attention in detail to the 1940 Statement and again requested an open hearing.

President Ballantine replied on July 23, 1954, advising that the Board of Trustees intended to follow the 1940 Statement of Principles, "although they do not consider they are legally bound to do so, and in so doing they will follow that Statement as they understand it." He added that the hearing would not be public. Apparently, the Board decided against a public hearing because other people were involved.

The Chairman of the Board of Trustees also wrote to Professor Moore, advising him that the Board and its Subcommittee considered that "the interests of the committee require your cooperation in attending an informal meeting. . .for the purpose of discussing" the situation. Professor Moore then wired President Ballantine that he would return "as ordered" for the meetings.

E. The Context

A statement of certain background circumstances may be helpful to an understanding of the succeeding events. During President Ballantine's term of office and prior to the summer of 1954, a struggle had taken place concerning the proper distribution of decision-making authority in the College. There were members of the student body and faculty who felt that President Ballantine and the Board were attempting to break with a long-standing tradition at Reed College of faculty self-government and student responsibility in disciplinary matters. The move to change the balance of power in the direction of more executive respon-

sibility was interpreted by some as designed to humiliate the faculty and to introduce conformity into the social life of the students. In particular, the faculty had resisted changes proposed by President Ballantine in the constitution of the College.

The local atmosphere at the time of the hearings may also be mentioned. The House Committee hearings in Portland received wide local coverage, and were televised if the witnesses did not object. There was much adverse reaction to the conduct of faculty members invoking the Fifth Amendment before the Committee. The prevailing mood is illustrated by the fact that there was a suggestion that the Reed College campus might be condemned for a Portland city college. Some persons of acknowledged maturity and judgment felt that the College might not be able to open the following year, or at least might suffer a severe setback, unless prompt measures to assure the public of its educational integrity were taken by the Board. It was the opinion of some members of the College community that the fact that the future of the College might be in grave peril was entitled to weight, and that it was the responsibility of faculty members to help "save" Reed by disclosing the facts with which the College had to deal. Others felt that these were arguments for expediency and might well result in an injustice in an individual case.

With this debate in progress in College circles, President Ballantine, on June 20, 1954, after consultation with the Chairman of the Board, suspended Professor X for the summer session. The faculty viewed this as a violation of an agreement which they believed had been firmly arrived at in a joint Trustee-Faculty committee to the effect that action would not be taken as a result of the House Committee hearings without prior consultation with the faculty. At a special meeting of the faculty, on June 23, a resolution was passed by a vote of 38 to 9, which called to the attention of the Board of Trustees "(1) its [the faculty's] view that this action has been a violation of the procedure promised by the President and sanctioned by the Board, (2) its hope that this action will be reviewed and reversed by the Board, and (3) the grave weakening of confidence in Presidential leadership which has resulted from this violation." President Ballantine wrote the alumni of Reed College, on July 3, 1954, that although Professor X had been relieved from teaching in the summer school, "his status on the faculty remains unchanged and his summer school salary is being paid." He added that Professor X's "relief from teaching is entirely without prejudice to his status on the faculty or to any decision which may be made in his case."

III. The Proceedings of Inquiry

It was in the context of such internal tensions and external pressures

that the proceedings of inquiry into the status of Professor Moore and faculty members X and Y went forward. The situation was further complicated by the absence of a clear formulation by this Association or other appropriate body of the professional standards applicable when a faculty member is called on to make disclosures concerning himself to his institution. The inquiry was conducted by three separate bodies, and it is not surprising that there was disparity of approach. The Board had asked for reports from the faculty and the President. The Faculty Council decided that it was the appropriate group to represent the faculty in assisting the Board, and it accordingly conducted an inquiry into the cases along lines and by procedures which it determined. The President had been requested to initiate an investigation on his own behalf and did so, in part in liaison with the Faculty Council, of which he was the Chairman. However, separate reports and recommendations were prepared by the Council and by the President. The Subcommittee of the Board referred to above was also charged with making a report to the full Board. As later outlined by this Trustees' Subcommittee to the Council through the President, on July 15, 1954,

1. A preliminary inquiry was to be conducted to give the Faculty Members an opportunity to talk informally and confidentially to the Council, President, and Subcommittee separately, with the object of the inquiry being to determine whether or not specific charges should be brought against the individuals;
2. At the next meeting of the full Board, August 6, representatives of the Faculty, the President, and the Subcommittee were to recommend whether or not specific charges should be brought;
3. If the Board decided to bring charges, formal hearings would be held.

A. The Faculty Council

1. *Scope and Procedure.* The Council felt somewhat handicapped in initiating its study by the absence of a precise formulation of the Board as to the misconduct of the three faculty members and as to its role in the inquiry. It will be recalled that, on June 1, 1954, the faculty had adopted a resolution that competence and performance in his subject and his relationship with his students were the determining criteria in considering a teacher's fitness. However, the Faculty Council agreed that the conduct of the three faculty members before the House Committee and the testimony of other witnesses in those hearings made it incumbent on the faculty to inquire anew into their fitness. After considerable discussion, the Council voted, on June 30, 1954, to recognize the following lines of inquiry as relevant to the allegations of misconduct:

1. The examination and evaluation of the testimony in the hearings of the House Un-American Activities Committee and of other materials

made available by the President and the Board of Trustees and the determination of the relevance of all these as evidence of misconduct on the part of a teacher warranting disciplinary action, and

2. The exploration, through its own hearings and otherwise, of evidence on the academic performance of these teachers bearing on their integrity and professional competence as demonstrated in their teaching, other professional activities, and relationships with students.

The Faculty Council appointed subcommittees to examine several items of possible evidence, including the Congressional Committee transcripts and student and faculty appraisals and opinions. A representative of the Council also communicated with Mr. Canon, who declined to enlarge on his testimony before the House Committee, stating that he had said in the public hearing all that he wished to say about the matters involved.

The President emphasized to the Council the Trustees' desire that all phases of the inquiry be held in strict confidence, and that the interviews with the three faculty members be at the discretion of those individuals. In these interviews, the Council decided that it was unnecessary, under its criteria, to seek information concerning membership in the Communist Party. Professor Moore, in an appearance before the Council and the President, did not volunteer information in that area. (At the later formal hearing, Professor Moore testified that, before the Council, he asked President Ballantine whether the question of his political beliefs and associations had been raised by anyone with the President at the time he was given tenure, and that the President replied that the matter had not been taken up officially by the Council or the Board of Trustees, but declined to state whether it had been raised at all. President Ballantine then testified at this later hearing that he did not dispute Professor Moore's testimony on this point.) Professor Moore discussed at length before the Council his understanding of the rights of a faculty member and of academic integrity. While some individual members may have advised him to cooperate, the Council as a group did not impress upon Professor Moore a duty to cooperate with the inquiry being made by the Subcommittee of the Board of Trustees.

On August 12, the day before Professor Moore's formal hearing, the President, following an interchange between the Faculty Council and the Board concerning the role of the Council in the hearing, replied that the special committee of the Trustees had indicated that—

> . . . members of the Faculty Council are invited to attend the hearing of August 13 as observers; and that the Board will be happy to receive any written statement that the Faculty Council desires to submit prior to the hearing and to afford an opportunity for the Faculty Council to confer with the Board after the conclusion of the hearing and prior to the Board's going into executive session.

2. *Report of Council to the Board.* On August 6, 1954, the Report of the Faculty Council to the Board of Trustees was submitted. The Council concluded that the testimony at the House Committee hearings did not establish any misconduct by faculty members warranting disciplinary action. "No subversive or other illegal action is alleged nor is there testimony to any unprofessional act on the part of any of the three in the classroom or in other relations with students or in their public utterances and activities." The Council pointed out that "membership in the Communist Party is still lawful. . . . We are concerned therefore with the fitness of a college teacher as teacher."

With reference to the academic performance of the teachers involved, the Council pointed out that the limited enrollment at Reed College, and the consequent relatively small faculty, led to a more thorough acquaintance of the faculty with one another and of the students with the faculty than was sometimes the case at larger institutions. The Council pointed out that evaluation of personnel was based on criteria which had been accepted for many years. These characteristics were: effective teaching, command of subject, personal character, contribution to the solution of college problems, research and professional interests, and participation in civic enterprises. These considerations "and no others" were the grounds upon which appointment, promotion, and tenure were judged. The Council stated:

> Political affiliation has not been considered relevant. Its omission is not an oversight but a deliberate consequence of the policy of academic freedom consistently maintained by the college. This has meant in practice the refusal of the President and Council to consider and to inquire into questions of political association and activity when these have on rare occasions been raised in connection with faculty appointments. . . . To abandon this condition now would be not only to abandon a cardinal principle of the college but to change arbitrarily the terms under which indefinite tenure and a contract were granted in the cases before us.

Concerning the academic fitness of Professor Moore in the light of the above criteria, the Council pointed out that, prior to coming to Reed, "He had acquired a widespread reputation as a brilliant scholar, a forceful lecturer and teacher, and a man who adhered consistently to the highest standards of academic performance." The Council then stated:

> His success at Reed has verified this reputation. His distinctive qualities as a scholar and teacher were immediately recognized by his students and his colleagues. The initial impression has been confirmed through the years by a series of rapid promotions and by appointment to permanent tenure. . . . The rapidity of his advancement has, of course, entailed an abnormally intensive scrutiny of his record by the Ad-

ministration and the Faculty Council. The annual evidence supplied by the customary appraisal forms as well as by voluntary comments has placed him consistently among the outstanding members of the faculty in terms of scholarly preparation, objectivity in the presentation of material and general effectiveness in the class room. . . . Though his views on political and social, as well as intellectual, questions have always been well known, there has been in these several years no suggestion from the students or the faculty of either distortion of subject matter or partiality toward any particular group of students on his part.

The Council reported that, at a meeting with Professor Moore, he had stated that—

. . . he would give first place to the unlimited pursuit and exposure of truth to the fullest extent of the scholar's capacity. He would consider any conscious suppression or distortion of the truth in response to any external allegiance or pressure to be a serious departure from acceptable professional behavior. He distinguished carefully between education and indoctrination; the first is the business of the scholar, the second he should strive continually to avoid. He should attempt at all times to resist the subtle unconscious pressures to create students in his own intellectual image, to be flattered by agreement with his own opinions, or in any way to transform students into disciples.

In discussing Professor Moore's place in the college community, the Council found:

He has in general been a willing and unusually fruitful participant in the work of academic and administrative committees. His contributions to faculty and staff meetings have been of great value to his colleagues. His skill in illuminating relevant issues has been especially noteworthy in interdepartmental and divisional seminars. A senior member of the staff has described him as having done more than any other person on the faculty to stimulate worth while informal intellectual discussion on the campus.

The Council concluded, with respect to Professor Moore:

In view, then, of the superior quality of his service, of his acceptance of and adherence to the highest standards of professional ethics, and the failure of the Council to find any evidence whatsoever of departure on his part from those standards which he professes, the Council recommends that no charges of misconduct be brought against Dr. Moore and that no disciplinary action of any kind be contemplated.

One member of the Council dissented from this recommendation. Because he was "opposed to the presence of Communist Party members on the Reed faculty," and because he believed that "Moore's attitude has not been helpful to our learning his true position relative to the party and membership in the party," he concluded that it would be "advisable for the Board to investigate formally the question of continuing Moore on the faculty under the present circumstances."

B. The President

On August 5, 1954, the President made his confidential report to the Board, stating that the scope of his informal inquiry related both to professional conduct, including any misuse of position in student relations, and to the allegation of relationship with the Communist Party. The President observed that he had found his inquiry impeded by Professor Moore's absence during a part of the time, and by his "apparent unwillingness to discuss informally any of the questions raised in the Committee hearings or subsequently in my own inquiry." In this connection, he referred to Professor Moore's statement in his first Open Letter that "It is an abuse of power for an employer to question an employee about his politics." and stated that Professor Moore had "subsequently explained that his use of the term 'politics' was meant to include 'revolutionary politics.'"

President Ballantine stated that he could not accept the above point of view; that he believed present membership in the Communist Party to be inconsistent with membership on a faculty because it is beyond the scope of permissible political beliefs and associations and academic freedom; that he recognized that, in a criminal trial, resort to the Fifth Amendment does not imply guilt; and that he recognized the "serious disadvantages" imposed upon an individual by Congressional investigation procedure. He continued:

> Moreover, I believe that refusal by a faculty member to answer questions regarding present membership or activity in the Communist Party makes it necessary for the college to inquire into the full facts. In such an inquiry the college has a right to expect, and the faculty member has a duty to respond, with full candor.
>
> Professor Moore has consistently refused to discuss the questions raised in this inquiry and has also indicated that if these questions are to be pursued, he desires that a formal hearing be held.
>
> I can only recommend, therefore, that a formal hearing be afforded him.

C. Trustees' Subcommittee

The Trustees' Subcommittee conducted its inquiry by means of an informal meeting on August 3, 1954, at which the Chairman of the Board presided, and four other members were present.

The Subcommittee conducted this preliminary inquiry, according to the prior statement of President Ballantine to the Council, in order to give the faculty member an opportunity to talk informally and confidentially with the object of determining whether or not specific charges should be brought. There is a dispute as to whether Professor Moore understood the meeting was being held for this purpose. The meeting

was informal, and no record was kept or notes taken. The evidence as to what transpired will be discussed in relation to the formal hearing and proof of the resulting charge below.

D. Action of the Board of Trustees

The full Board of Trustees took action in the cases involving the three faculty members after consideration of the reports submitted to it by the Faculty Council, the President of the College, and its own Subcommittee.

1. *Two Faculty Members.* The Board decided to prefer no charges and to take no disciplinary action in the cases of Professor X and Instructor Y, for reasons explained in a public statement dated August 7, 1954.

The Board indicated in its statement that it recognized that invocation of the Fifth Amendment carries no implication of guilt, and noted its belief that this was not in itself grounds for dismissal, but deplored as a matter of policy the invocation of the Amendment by a faculty member. The Board added that, since it was not conducting a criminal trial, it could not ignore the serious questions which invocation of the Amendment left unanswered, and that it was necessary for the College to inquire into the full facts when a faculty member refused to answer questions regarding present membership or activity in the Communist Party. "In such an inquiry the College has a right to expect, and the faculty member has a duty to respond with, full candor. Failure to do so would be justifiable grounds for dismissal."

The Board also expressed its view that continuing membership in the Communist Party went beyond the scope of political beliefs and associations and the scope of academic freedom, and made "impossible the confidence which must be extended to a faculty member if he is to perform his duties with academic freedom." The Board continued that it did not regard past membership as a disqualification in itself, but that it did consider of great importance that the severance of any past membership be *bona fide*, and that "there be no question of present or future domination" by the Communist Party.

The statement discussed the fitness of Professor X and Instructor Y and, after reviewing the available information, came to a favorable conclusion with regard to both of them, despite their possible past membership in the Communist Party. The Board concluded that, on the basis of the evidence, it was satisfied that Professor X "is not now a member . . . and has not been for some years past, and that he is a loyal American citizen." As to Instructor Y, the Board noted that he had cooperated freely, that while he had been named as having been a member of the Communist Party as a student, he had not been a member

during the time he had been an instructor at another institution in 1952–53 and at Reed College in 1953–54. The Board concluded that there was no indication of misuse of position by him in or outside of the classroom.

2. *The Charge in Professor Moore's Case.* Under date of August 6, 1954, the Board charged Professor Moore with "failure to cooperate with the Board of Trustees of Reed College in the particulars hereinafter stated." The charge recited that Moore had

> . . . refused to answer each of the following questions [of the House Un-American Activities Committee]:
>
> Did you ever attend any meetings of the Political Affairs Committee of the Communist Party in Alameda County?
>
> Do you know in Oakland, California, a building known as the Alameda County C.I.O. Building located on Grand Avenue?
>
> Did you ever attend a meeting of any kind at the C.I.O. Building located on Grand Avenue in Oakland, California?
>
> Have you ever been a member of the Communist Party?
>
> Are you now a member of the Communist Party?

It also summarized the testimony of Mr. Canon, and concluded:

> The committee of the Board of Trustees of Reed College requested your co-operation in attending an informal meeting of the committee on August 3, 1954, for the purpose of discussing the above situation.
>
> You attended the meeting of said committee, but even though the committee agreed that any information given by you with respect to your past or present connection with the Communist Party would be held in confidence you refused to disclose any information with respect thereto.

Moore was advised that he might have counsel at the hearing, on August 13; that the hearing would be closed; and that a copy of the stenographic record would be furnished to him.

IV. Hearing and Decision

A. The Formal Hearing on Charge of Noncooperation

The hearing was held as scheduled, with thirteen members of the Board and its counsel, seven members of the Faculty Council, and Professor Moore present.

Professor Moore stated at the outset that he intended to make the record public. He stated that the Chairman had given his unofficial opinion that the charges did not involve moral turpitude, and he sought to argue that point. He obtained a ruling that his competence was not in issue.

1. *Affirmative Case.* There was first introduced evidence on behalf of the Board in support of the charge. This documentary evidence consisted of the transcript of the hearing before the House Un-American

Activities Committee at which Professor Moore, Mr. Blodgett, Mr. Canon, and others had testified; Professor Moore's first Open Letter; and the communications from the President and from the Trustees' Subcommittee requesting Professor Moore to return to talk with the Faculty Council, President, and Trustees' Subcommittee. A Board member was then called as a witness, and after being sworn, testified concerning the meeting with the Trustees' Subcommittee on August 3. He testified that Professor Moore was told at the outset of the meeting that it was "purely informal and whatever he desired to discuss and reveal to the committee would be held in strict confidence and be held to be released only as he desired it to be released." He testified further that at that meeting Professor Moore added nothing to the Trustees' Subcommittee's information, but had indicated "clearly and unmistakably" that it was not the business of the Board to concern itself with his political interests and affiliations. This witness also testified, on cross-examination, that another trustee, then present, had asked if Professor Moore would care to answer whether or not he was at that moment a Communist, and that Professor Moore had replied that he did not wish to answer that question.

2. *Defenses.* Professor Moore offered three arguments in defending himself against the charge. First, he objected to the procedure used in the investigation, on the ground that it was unfair, and departed from standard practice and the procedures recommended by the American Association of University Professors. Secondly, he contended that in his case the College had changed its policy; for although it had had prior knowledge of his alleged connection with the Communist Party, it had not considered it relevant to the granting or continuation of his tenure. Thirdly, he argued that the policy of the College, referred to in the statement of the prior week relating to the two other faculty members, that present membership in the Communist Party is inconsistent with faculty status, departed from the established definition of academic freedom.

(a) Procedure. Professor Moore argued that the procedure which the Board was following was defective in two respects. The first defect was the Board's action in making a preliminary investigation of the facts rather than in filing formal charges against him. If the usual procedure had been followed, he felt, there would have been charges that he had violated proper standards of professional conduct in being a member of the Communist Party or in failing to cooperate with a duly authorized branch of the government. Instead, the Board had filed a charge of failure to cooperate in an informal discussion. The effect of the procedural posture in which the Board had placed the case, he urged, was to shift the burden of proof from the Board, upon whom it should rest, to himself.

The second aspect of the procedure, objected to by Professor Moore, related to alleged representations of the nature of the meeting of August 3 with the Trustees' Subcommittee. Professor Moore contended that he gained the impression from a lengthy colloquy at the outset of that meeting that any information he gave would be confidential at his discretion and that, unless he waived some privilege accorded him, the entire proceedings would be confidential. Under this interpretation, his failure to answer questions asked "would leave the Trustees exactly where they were before . . . as though they hadn't had a meeting," and the Board would be unable to base charges on anything that transpired there. A member of the Trustees' Subcommittee testified that the understanding was that any information imparted would be held strictly confidential and would not be disclosed to the full Board without the consent of the person being heard; and that he had informed Professor Moore at the August 3 confidential meeting that the Subcommittee's report, based on the information given, would be made to the full Board, it being up to the latter to decide what to do on the basis of all the reports received.

(b) Estoppel or Waiver. As his second argument in defending himself, Professor Moore sought to establish that the official policy of the College not to have political criteria for appointment or tenure precluded the asking of the questions he was charged with refusing to answer. He contended that the question of his political activities had been frequently raised and that the conduct of the Reed College authorities in failing to pursue this line of inquiry until 1954 put the Trustees in the position of acting retroactively and passing what was in effect an *ex post facto* law.

As evidence of the prior policy of the College, Professor Moore testified as to his conversation with the interviewing professor at the time of his appointment. The trustee who had discussed Professor Moore with two presidents of the College was ill at the time of the hearing, and, being unable to call him as a witness, Professor Moore introduced evidence to establish that the trustee had raised the allegations of his Communist affiliation with President MacNaughton. He also sought to call President Ballantine as a witness and to ask him whether the same trustee had raised with him the question of Professor Moore's alleged affiliation with the Communist Party. President Ballantine stated that he had no objection to answering such questions. However, counsel for the Board advised that the evidence to be adduced by this line of questioning was not relevant to the issue in the hearing, and advised against permitting it to be introduced, in view of the fact that Professor Moore had indicated his intention to make the record public. On motion, the Board voted to uphold the counsel's recommendation, and refused to permit President Ballantine to be called as a witness. It was also ruled

that Professor Moore could not read into the record the questions he desired to ask President Ballantine, counsel for the Board taking the position that the questions alone would be of no assistance in the Board's determination, and that Professor Moore wanted them in the record to be used for a purpose not to the best interest of the College.

Finally, Professor Moore testified that he had heard that Robert Canon had informed President Ballantine in January, 1954, that he had known Professor Moore as a member of the Communist Party at Reed College.

(c) Communist Exclusion. The final point which Professor Moore made in his defense was that a policy of exclusion of members of the Communist Party from the faculty was a departure from the accepted definition of academic freedom and the tradition of Reed College. He contended that there was no legal change justifying the adoption of such a policy because the applicable federal statutes had not made membership in the Party illegal *per se*. He urged also that public opinion could not be used as a criterion, it being the obligation of the Trustees to protect the College against such pressures. It was Professor Moore's opinion that, in any event, it was the members of the teaching profession themselves, and not the Trustees, who alone were competent to modify academic freedom principles.

3. *Faculty Participation.* After Professor Moore concluded his presentation, the chairman of the Board invited the Faculty Council to submit a report or statement for the record, and also announced that the Board expected to hear the Council informally and off the record. The Council made a part of the record the substantive discussion in its report to the Board of August 6, 1954. One member of the Faculty Council made an additional statement on behalf of the Council.

The Council took no position on whether there had been such a refusal to give information as would constitute a failure to cooperate, stating that this was a question of fact or judgment for the Board. With respect to the propriety of the questions asked Professor Moore, the Council emphasized that academic tenure puts the burden of proof on those who bring the charge against a teacher. It must be shown that the matters charged are relevant and serious. The Council argued that it was a long-standing policy of the College to place no limitation on lawful political beliefs and action. The Council concluded by discussing the question of whether failure to cooperate with the Board, if it were established factually, should be considered conclusive without weighing other criteria for fitness. The Council sought in this connection to define the duty of cooperation. Viewed from the perspective of the principles and standards of Reed College and of the general principles of

academic freedom and tenure, the Council felt that an act of noncooperation, if proved, was a very relevant factor in regard to tenure. It argued, however, that a decision concerning termination of tenure should not be based solely on such a specific failure, but should be made in the light of the general service and performance of the faculty member involved. One member of the Council felt that an act of noncooperation as defined, if established, would be decisive.

B. Findings and Dismissal

In the Board's executive session at the conclusion of the hearing, it adopted a resolution finding that the charges against Professor Moore had been sustained and directing his removal from the faculty. He was granted one year's severance pay.

The Board's statement accompanying the dismissal, dated August 13, 1954, reviewed its general policies with respect to its duty of inquiry upon refusal of a faculty member to answer questions before a legislative committee relating to present membership or activity in the Communist Party. It reaffirmed its view that under such circumstances the faculty member has a duty to respond to the institution's questions with full candor, and that failure to do so would be justifiable grounds of dismissal. The statement set forth the circumstances of Professor Moore's appearance before the House Subcommittee, and the fact that he had been named as a Communist Party member.

It was stated that Professor Moore's policy of noncooperation had been set forth in his Open Letter of June 3, in which he said that it was an abuse of power for the College to question a faculty member about his politics. The Board added that, at the Trustees' Subcommittee meeting of August 3, "Professor Moore refused to disclose to them any information concerning his past or present membership in the Communist Party." The statement continued:

> We believe that membership in the Communist Party today is not consistent with membership in a college faculty. It is beyond the scope of political beliefs and associations and also beyond the scope of academic freedom. It makes impossible the confidence which must be extended to a faculty member if he is to perform his duties with academic freedom. Academic freedom can never be used for the aid of those who would destroy academic and all freedoms.
>
> We therefore consider that an inquiry into these matters has been both necessary and proper and that Professor Moore's refusal to cooperate has been misconduct.

Finally, the Board addressed itself to the point of whether there had been a change of position amounting to a breach of the conditions of employment previously prevailing at the college:

In view of Professor Moore's public assertion that when he was first employed the college expressed indifference to his politics, we have found that at no time did he state or did any of the college authorities have knowledge that he was a member of the Communist Party.

It has never been the policy of this Board of Trustees to knowingly employ or retain as a member of the Faculty a member of the Communist Party.

V. Comments of Investigating Committee

A. The Charge

1. *Proof.* Professor Moore appears to have entered a direct defense to the charge of failure to cooperate with the Board by alleging that the critical question as to whether he was then or ever had been a member of the Communist Party had not been asked at the August 3 meeting with the Trustees' Subcommittee. The dispute on this point seems to involve the question of how specific the proof of failure to cooperate must be. One way of answering this question would be to hold that proof would be necessary that Professor Moore was asked a specific question, was ordered to answer, and thereafter refused to do so. The Board itself seemed to treat the charge as somewhat analogous to failure to discharge the burden of going forward with the evidence. This investigating committee concludes that a refusal to cooperate can be made out by a general refusal to discuss or explain an alleged relationship with the Communist Party and by such an indirect refusal to answer specific questions as is demonstrated by the record in the case. Professor Moore's Open Letter contained an anticipatory refusal to answer the questions at issue by virtue of the statement that it is an abuse of power for an employee to be questioned about his politics by his employer. There is also in the record sworn testimony that Professor Moore reiterated in detail his position that these matters were not the business of the Trustees and that he added nothing to the information the Trustees' Subcommittee had obtained from the hearing of the House Committee, where he had also chosen to remain silent. There was further testimony that at the Subcommittee meeting a trustee had asked whether the Trustees were to understand that he would not care to answer questions concerning his past or present membership in the Communist Party, and that Professor Moore had replied that he did not wish to answer.

If Professor Moore misconstrued the Board's intent, it would have been a simple thing for him to say at his formal hearing that he was now prepared to discuss his alleged connection with the Communist Party. The crucial questions were not asked at the formal hearing; but the Board's desire to have them answered was apparent, as was Professor Moore's attitude toward answering.

We conclude that there is no real question as to whether or not Professor Moore failed to cooperate with the Board. In any factual sense, he surely did fail to cooperate; indeed, his basic defense is that he was justified in this failure. The central question is whether his failure to cooperate warranted his dismissal from a tenure position. In our mind, the resolution of this problem turns on the relevance of questions asked to the issue of fitness, and on the grounds on which he based his refusal to answer them. We will discuss these basic issues below, but first we will comment on the alleged assurance of complete confidentiality of the meeting with the Trustees' Subcommittee and, at the request of Professor Moore, on certain special defenses which he presented as peculiar to his case.

B. Special Arguments

1. *Confidentiality of preliminary meeting.* Professor Moore's argument based upon the representation of confidentiality of the August 3 meeting does not warrant extended discussion. It is generally to the advantage of a faculty member that a preliminary inquiry into his fitness be confidential. The question at that stage is whether probable cause as to unfitness exists. In this case, it was apparent and disclosed that either the matter would end at the preliminary stage or charges leading to a formal hearing would be brought. In the circumstances, there was no ambiguity as to what the Board expected of Professor Moore, or as to the possible consequences of a choice of silence.

2. *Academic due process.* Professor Moore's argument based on the Trustees' refusal to allow him to question President Ballantine about the prior policy of the College, as evidenced by allegations of Professor Moore's Communist Party membership, was restated in his press release of August 13, 1954, setting forth the questions he had desired to put to President Ballantine. These questions related to whether or not a trustee had early raised the question of Professor Moore's possible membership in the Communist Party; whether Robert Canon had told the President in January, 1954, that he knew Professor Moore had been a Party member; and the reasons for the President's failure to investigate in both instances. Professor Moore also wished to question President Ballantine as to why he did not raise the question when Professor Moore was voted a second leave of absence.

In our opinion, these questions were relevant, and should have been permitted. They related to the propriety of the questioning which was the basis of the charge, Professor Moore having contended that the College had waived any right which it might have had to consider the questions pertinent. As to the basis of exclusion—that Professor Moore had announced an intention to make the transcript public, we are inclined to

the view that his repeated resort to public media was unwise, but that embarrassment to the College could not justify cutting off the development of his defense at the hearing.

On the other hand, Professor Moore had already made his point as to his raising of the criteria for employment at the time of his appointment and the trustee's interchange with President MacNaughton. Thus the evidence which he was prevented from introducing was, to a considerable degree, cumulative. We conclude, on the basis of the entire record, that the error was an isolated one and did not amount to a denial of academic due process to Professor Moore.

3. *Change of Policy.* We have given much thought to Professor Moore's defense that there was an arbitrary and retroactive change in the conditions of academic tenure at Reed College respecting Communist Party membership on the part of a faculty member. This raises the general problem of where responsibility lies for formulating College policy and how approved policy is evidenced.

It will be recalled that the Board's statement accompanying Professor Moore's dismissal included the comment that it had never been the policy of the Board of Trustees knowingly to employ or to retain a Communist Party member as a member of the faculty. The Board declared such membership to be beyond the scope of permissible political beliefs and associations. It appears to have been the conviction of most members of the Faculty Council, as well as Professor Moore, that the traditional policy of the College involved no limitation on political beliefs and actions that were "within the framework of the law." The Board and faculty may have reached different conclusions, therefore, in part because of differing premises as to the nature of the Communist Party. (The legal status of the Communist Party in 1954 was so involved a matter that we have not felt it possible to venture into that area in this report.)

Whether the Board's statement is to be credited fully, or whether there was some subtle shift in policy reflecting the course of recent events, we think it impossible to state. In any strict sense, the policy of the Board can be shown only by its own action. Moreover, experience indicates that often issue is not joined until there is a case, and it is impossible to know policy with certainty until there is occasion for its expression.

With respect to the point of particular representations to Professor Moore, from a technical point of view, perhaps, they can be discounted. Assuming the College to be bound morally if not legally by representations made by the interviewing professor at the time Professor Moore was appointed, it is possible to attach little importance to that incident. Professor Moore seemingly said no more than that he had been accused

of being a Marxist in belief and action, and he may have indicated that he was in fact a Marxist. Some would think that such remarks connoted that he might be a member of the Communist Party; to others they would imply that, while a Marxist, he was not a member of the Communist Party. The Board presumably would argue that when the interviewing professor said there was complete academic freedom at Reed College, he could not be assumed to have meant that it would be of no consequence if a faculty member should refuse to answer questions concerning Communist Party membership before a legislative body, or refuse to cooperate in an institutional hearing with regard to questions about Communist Party membership. President MacNaughton conducted an informal investigation into Moore's alleged Communist affiliation and reported he had found nothing. President Ballantine chose not to pursue the matter on the basis of allegations. Reluctance to lend credence to reports is as tenably established by these incidents as the conclusion that they were regarded as unimportant.

The Board made a finding, in its statement of August 13, 1954, that at no time did Professor Moore state, nor did any of the College authorities have knowledge, that he was a member of the Communist Party. The finding seems in accord with the facts when interpreted to apply to positive information of present membership. The authorities did know, prior to the summer of 1954, of evidence that he had been a member. At no time did they have any probative evidence that he had terminated such alleged membership as of any date in time. We think a change in position on the part of the Board is not established. It remains that Professor Moore came to the College before the Board's adoption of policy. The interplay between formality and informality is complex in this case. In our opinion, it would have been well if the Board had considered as a pertinent factor in its decision on Professor Moore's status the previous informality of policy and the apparent lack of consistency and meeting of minds among the various parts of the college family on the conditions of tenure at Reed College as applied to Communist Party membership.

C. Basic Issues: Relevance of Questions and Duty of Disclosure

1. *General Discussion.* The basic position taken by the Board of Trustees and first enunciated as an outgrowth of the cases involving two other faculty members was that present membership in the Communist Party is incompatible with faculty status at Reed College. It is evident that the Board had this general policy in mind as it proceeded with its inquiry and when it dismissed Professor Moore, even though the decision was not based upon this policy, but rather upon the ground of

refusal to cooperate in answering questions. Whether or not the dismissal of Professor Moore can be regarded as justified turns, in the first instance, upon whether he could properly be addressed with questions concerning his alleged Communist affiliations. If not, the refusal to give information would not be evidence of the lack of cooperation that should be expected of a faculty member, and neglect of duty would not be established. The general principle of the citizen's freedom of political belief and affiliation as part of the freedom of the teacher would indicate that the information desired could not appropriately be required unless allegation of membership in the Communist Party calls for exceptional treatment.

In relating the Board's policy to the effect of silence by a faculty member with regard to his relations with the Communist Party, which is the central question in this case, one of four possible guides to evaluation may be applied:

Guide 1: Membership in the Communist Party is irrelevant to fitness to teach. It follows that a faculty member has no duty to answer questions relating to such membership.

Guide 2: Membership in the Communist Party is a relevant factor in assessing fitness to teach, but the faculty member has no duty to answer questions with relation to it. In any proceeding against a faculty member, the institution must carry the burden of proof concerning the fact of membership and the influence of such membership upon the teacher's performance of duty.

Guide 3: Membership in the Communist Party is relevant to fitness to teach to a degree which imposes upon the faculty member a duty to answer questions with regard to it; but a refusal to answer such questions is, like membership itself, not conclusive, and must be weighed with the reasons for it and with the quality of the faculty member's academic service.[1]

Guide 4: Membership in the Communist Party is relevant, and must be negated by the faculty member in a proper inquiry if he is to merit retention in his position.

Guide 1 leads to the clear conclusion that the Board was wrong in dismissing Professor Moore. Guide 2 leads to the same result, because neither present membership nor any effects on Professor Moore's teaching was alleged or proved. Guide 4 leads clearly to the opposite conclusion—that the dismissal was justified. Guide 3 does not lead to such a clear conclusion in this or any similar case. Once the admission is made that Communist Party membership is relevant but not conclusive, and

[1] *Cf.* "Academic Freedom and Tenure in the Quest for National Security," *AAUP Bulletin*, Spring, 1956, pp. 49–107, especially pp. 54–61. Cf. also Spring, 1955, especially p. 97, paragraphs 8 and 10.

that there is a duty of disclosure, delicate judgments are required; an investigating body must determine whether they were made, and evaluate them to the extent that they were made. Guide 3 raises the question whether, in the present case, the Board of Trustees considered the indications that Professor Moore's stand against discussing his political affiliations was actually based on principle. Under Guide 3, the question also arises whether the Board gave weight to Professor Moore's full teaching record. The application of Guide 3 to this case is considered in detail below.

As only Guide 4 would uphold the action of the Board of Trustees on the basis of its formal pronouncement of August 13, 1954, and without a full interpretation of the record, it is particularly important to give critical attention to the policy position which underlies Guide 4. If we grant that Communist affiliation is relevant to fitness to teach, there still remains the difficult question, How shall we decide whether there is in fact such affiliation? The placing of the responsibility of disclosure on the faculty member is proposed in Guide 4 as a necessary method of decision. A faculty member may properly be considered as carrying the burden of proof of his academic competence and integrity all during the pretenure period. But certainly there are special dangers in placing this burden of proof upon a faculty member with tenure with reference to the matter of Communist affiliation.

A conclusion about the soundness of Guide 4 must weigh the hazard of keeping some of those teachers alleged to have, and some, perhaps, in fact having, Communist affiliations, against the hazard of inaccurately dismissing some who do not have a close enough tie with Communism to make them ineligible for faculty status on the basis of Guides 2 and 3. There is a further problem in Guide 4's radical departure from the traditional practice of showing respect for the whole record of performance of the faculty member involved in a tenure proceeding.

We feel it appropriate to suggest the danger of a precedent in a recognition of the validity of a charge of "noncooperation." Against such a vague, indefinite, and limitless charge, the faculty member is at a considerable disadvantage. Admittedly, there will be cases where he may be said to have put himself in such a position by his own choice. However, we recoil from such a disadvantage as one generally alien to a due process proceeding. At a minimum, academic due process seems to us to require that a faculty member with tenure is entitled to consideration of factors which might conceivably offset his possible misconduct of noncooperation. These factors should include (1) his record of performance in service to the College, and (2) his motives or reasons for the act of noncooperation. In saying this, we are in effect rejecting

Guide 4, as indeed we would be required to do in applying the principles adhered to by the Association.

2. *The Case for Guide 3.*

(a) The question of Communist Party membership is relevant in determining a faculty member's fitness. There are times when we need "education in the obvious more than investigation of the obscure." We cannot be reminded too often that a college or university is an institution dominated by and dedicated to the pursuit of the truth. Academicians have urged that academic freedom is so important that as few nonacademic limits as possible should be applied to membership in the academy. The university can achieve "universality" only if it is not required that each member be "universal." The university can pursue truth only by admitting dogmatists along with those of more flexible outlook.

Violations of academic freedom can have no friends. As Catholics, Protestants, Jews, Republicans, Democrats, pacifists, and nationalists, we must embrace tolerance—if not for the sake of others, for the sake of ourselves. Experience indicates that exceptions have a way of becoming rules, and rules, exceptions. When we muzzle the unpopular we fashion our own bondage.

The difficulty comes when we attempt to relate these ideal standards of academic freedom to community attitudes formed by a sense of national insecurity against the threat of outside domination by the Soviet Union and the phenomenon known as international communism. This endeavor is especially troublesome in the case at hand, which has the distinguishing characteristic that both the charge and the final decision appear to rest solely upon the faculty member's refusal to make disclosures.

Any requirement for faculty or student membership in the academy other than "academic" requirements represents a compromise with the larger community. At various stages in history, offenses deemed to involve moral turpitude, which might or might not be legal offenses, have been considered discreditable to the teacher. The definition of moral turpitude comes to the college from outside, from the community of which the teacher is a part, and is entered primarily as a protection to students. However, there are also cases where the aim is to protect other faculty members from evil or degrading influence. There have also been examples of religious restrictions, such as the long-standing former ban on Catholicism in English universities. Today numerous restrictions are proposed on the basis of national security.

A limit on "conspiracy" is no more alien to the ideal of the academy than a limit on some other types of undesirable personal activity. In

both cases a limit is forced inside the wall, in part by nonacademic considerations.

There is no record before us from this case as to the nature of the Communist Party, and no expertise on that subject is here asserted. The considered view of the Association is that indications of Communist Party association raise possibilities that go to the question of fitness to remain in a faculty position. This view is based on the premise that the nature of the Communist Party is, "in one of its aspects, a conspiracy against honest education." Therefore a ground of inquiry is raised by credible evidence of affiliation with the Party, because the teacher thus creates "a possibility of his involvement in activities subversive of education itself, or otherwise indicative, to an important degree, of his fitness to teach."

That the Communist Party attempts domination of its members, what they think, and what they say, seems hardly fanciful. There are, moreover, aspects of Party activity which may with reason be termed conspiratorial rather than political. If, consequently, a substantial indication of possible Communist affiliation arises, the faculty member's institution may properly ask him questions about the matter.

(b) In the described circumstances, a duty of disclosure arises. Academic freedom is primarily a right which we claim for the sake of the community—a right by the exercise of which each of us may vindicate the public interest. The silence which is legally proper under the Fifth Amendment can be claimed only on a ground of possible *self*-incrimination, not to protect others. The converse is true of academic freedom. We claim it to protect educational and community interests. To equate the right not to speak with the right to speak is to confuse different problems. We are often enough urging that administrations be sturdy in the face of public opinion. It seems quite too much to expect them to do so, unless in return they impose on the faculty member, who bears a fiduciary relationship to his colleagues and institution, and who alone is in possession of the facts, an obligation to account for his trust, and to inform the institution of the facts with which it must deal. We cannot be the keepers of the individual conscience. If the moral influence of the academic profession is to be maintained and nourished, however, it seems apparent that we must place an "accent on obligation" as well as on rights.

In summary, the institution is entitled to ask "the question," since it is relevant to fitness. The faculty member then has the duty of answering. Present membership in the Communist Party is a potentially disabling factor so far as fitness to teach is concerned. Thus, credible evidence of Party activity should be explained. The faculty member is entitled to an honest judgment by the deciding tribunal, a judgment

which rests on substantial evidence introduced at a hearing, plus his demeanor. Ordinarily, that judgment should be made in the first instance by his peers, his faculty colleagues.

As the institution may impose a duty to answer "the question," it may treat failure to do so as misconduct. The gravity of the misconduct in its relation to fitness to teach depends upon the motive for refusal to answer, whether based on principle, or on a desire to conceal, or on mixed motives.

(c) The basic requirement is that there be a determination of *fitness to teach*. Fitness to teach in the sense of academic integrity and objectivity is the ultimate issue. There are different degrees of present affiliation or attachment to the Party by the faculty member; there are different degrees of past attachment or involvement; there are different degrees of commitment regarding the future relationship to the Party; and there are varying employment records: derogatory information, mere lack thereof, positive and concrete evidence of academic integrity. There are people who came to Communism in the period of economic struggle and Popular Front illusion and those who came or remained in the period when the image had succumbed to cold reality. There are those who were attracted to Marxism as a theory of history, and thence went into the Party, and there are those among this group who were carried to the action phase of internal class struggle and minority revolution. The structure of the Communist Party itself is complex; to know the fact of membership is to know something, but not enough. Or, as stated by one of the trustees of Reed College to this committee, "Well, there are Communists and there are Communists." We gain equilibrium and perspective as we retreat from the view of the Communist Party as a collection of uniformly vicious and effective conspirators, and attempt to discern the quality and effect of individual attachment.

Undue emphasis can be placed on determining whether membership in the Communist Party is properly considered a bar to faculty status, and whether questions concerning it are permissible. Membership *is* a *relevant* fact. It is entitled to more or less weight, depending on how it illumines other professional activity as indicating independent or dictated judgment. It is not conclusive on the issue of fitness to teach in the sense of academic integrity. Equally relevant questions would be whether the faculty member had ever used the classroom or his position to indoctrinate students; whether he had been under the control of a foreign power, surrendered his free will to any organization, advocated the violent overthrow of the government, or followed dictation from any source in writing or teaching. When there is a legitimate inquiry into a teacher's fitness, *i.e.*, when a substantial indication of possible Com-

munist affiliation arises, a duty may be imposed to make satisfactory responses in a limited area.

(d) Guide 3 applied. Professor Moore's failure to cooperate raises the essential issue of whether such failure justified his dismissal and, if not, how other factors are to be evaluated. Professor Moore made a claim to conscience. As a private matter we are entitled to express no opinion. His claim was, however, improper when we face the problem of measuring the professional consequences of noncompliance with the duty to respond. ". . . [I]n any proper inquiry by his institution, it is the duty of a faculty member to disclose facts concerning himself that are of legitimate concern to the institution, namely, those that relate to his fitness as a teacher. . . ."[1]

The conclusion that the Administration was entitled to treat Professor Moore's silence as a breach of professional duty does not, however, resolve the matter. This committee further concludes that Professor Moore's "fault" in failing to respond was not "clearly determinative of professional fitness" without a finding as to other factors pertinent to that issue. The weight of this particular adverse factor depends upon his motive. The record would *support* a finding of motive based solely on principle, or of mixed motives, including silence in order to conceal, *viz.*, fear of testifying because truthful testimony would reveal a relationship to the Communist Party that would subject him to economic, social, or legal sanctions.

Professor Moore's colleagues never doubted his sincerity. The Board appeared to make no real attempt to arrive at any determination on this issue, although the record is not easy to interpret. Certainly the Trustees afforded him considerable opportunity to persuade them that his claim to silence was based solely on principle. However, there is no statement by the Trustees to the effect that this possibility was considered, and little indication that it would have made any difference to the Trustees had they been so persuaded. From their statement accompanying the dismissal it seems, on the contrary, that they were operating by reference to Guide 4. To the extent appropriate and feasible, we have attempted to explore what the Board members actually considered and weighed as distinguished from their inadequate statement. We are mindful that it is to the last degree difficult for members of the Board to state now what were the deciding considerations, apart from the written statement. Our discussions of this point with the four trustees interviewed were frank and full and without any perceptible

[1] Report of Special Committee, "Academic Freedom and Tenure in the Quest for National Security," *AAUP Bulletin*, Spring, 1956, p. 60.

reservation. Some assumed Professor Moore's sincerity. The closest approach to a finding of multiple motives was an impression, on the part of some members of the Board, based on demeanor, of urge to martyrdom.

It would seem reasonable to conclude, by the rules of Guide 3, that the Trustees' *modus operandi* resulted in an incomplete consideration of the case.

When the Board of Trustees was faced with determining the consequences of foreclosing inquiry, it should have endeavored to evaluate the reasons for Professor Moore's silence. Moreover, in this determination of the weight of that adverse factor, the quality of service and all affirmative evidence of integrity were relevant and should have been taken into account, and a decision should have been made whether, on the basis of all relevant evidence, a finding of professional unfitness had been shown. Here the evidence rose above a mere absence of derogatory information. The Trustees had available the Faculty Council's findings as to academic integrity, but it is not clear to the investigating committee how much, if any, weight they attached to those findings. This evidence was quite concrete, and it came from fellow faculty members with an unusual opportunity to observe. The Board made no finding, although that affirmative evidence was before them, as to whether Professor Moore's utterances and actions proved or contradicted open-mindedness, independence, and critical judgment. The necessity for such findings is underlined when we recall that the very purpose of tenure status is to give that security of position and that protection which are necessary for academic freedom. The inquiry and findings should, of course, be confined to integrity, rather than extend to fitness in other respects, since competence, as determined when tenure is granted, is not an issue.

It would seem reasonable to say that when Guide 3 is applied in this aspect to the action of the Trustees, the Trustees again must be found to have based their decision on an incomplete consideration of the case.

The above discussion meets Professor Moore's argument that the preliminary inquiry technique and the resulting charge of failure to cooperate departed from established usage in such fashion as to evade the requirement of stating and proving specific charges, and had the effect of shifting the burden of proof from the prosecution to the defense. We conclude that the character of the charge did not in itself deprive Professor Moore of the right to have the reasons for his failure to cooperate evaluated in terms of his sincerity or concealment, and to have the quality of his service taken into account. The errors of the Board are here found to be in the steps taken subsequent to the filing of the charge.

3. *A Dissent from Guide 3.* In light of the difficulty of applying Guide 3, as exemplified in this case, one member of the investigating

committee, Edward C. Moore, feels constrained to dissent from it, although he recognizes that it expresses the considered position of the Annual Meeting of the American Association of University Professors. In his view, the obligations pertaining to academic freedom embrace the following: (1) that the faculty member say in the classroom only what he believes to be true, (2) that he not discuss in the classroom matters not germane to his field of competency, (3) that he not use his position as a member of the college community to dignify off-campus activities with which his institution is not associated. He believes that on the evidence Professor Moore did not violate any of these obligations, but, on the contrary, admirably satisfied his professional obligations to academic freedom. This member adheres to the view that behavior outside the classroom—except as it involves moral turpitude—is not a proper subject of inquiry in discussions of professional fitness. The institution has a right to inquire, and the faculty member has a duty to respond to questions, only about behavior in the classroom. This committee member feels that membership in the Communist Party—outside the classroom—constitutes either political activity or an illegal conspiracy. In neither case is it a fit subject for inquiry by a Board of Trustees. If the former, it is irrelevant to them; if the latter, it is a matter for the law enforcement officials and the courts.

The proper procedure in a dismissal case is that a jury of the teacher's peers investigate a charge and accumulate evidence of classroom behavior, confront the teacher with the evidence, hear his defense, and render a judgment. The committee member notes that the latter was done in the case involving Professor Moore, and the Faculty Council found him not guilty. The Board of Trustees had, in this view, no tenable grounds for reaching a different conclusion.

If the recent declarations of the Association are to be applied to the case, the dissenting member agrees that those principles have been accurately and faithfully applied to the facts of this case. To that limited extent he joins the above substantive discussion of the committee. He also fully concurs in the rejection of Guide 4 and in the earlier findings of fact.

VI. Post-1954 and Present Situation

President Ballantine resigned in the fall of 1954 and was replaced by President Frank L. Griffin. The Chairman of the Board of Trustees also resigned, and there were certain other changes on the Board due to a rotation practice and to some extent because of the strains of the period.

President Griffin, a senior member of the faculty, had been away during the Moore controversy. He had participated in the drafting

of the original constitution in 1915, and was intimately familiar with the traditions of the College. He had the complete confidence of faculty members and the helpful cooperation of the Board. The period of 1954–56 can be described as one of rallying around the College by all those interested in its welfare. The stresses of the immediately preceding period receded and were replaced by a spirit of common purpose among the Faculty, President, and Board.

In 1956, Richard H. Sullivan became President of the College. There is impressive evidence that, under the present leadership, mutual understanding prevails in administration-faculty relationships. The morale of the faculty appears to be high, and to be marked by sincere respect and enthusiasm for the President and the Board. Members of the Faculty Council adhere to their former positions with respect to Professor Moore's case, and think he is entitled to secure the considered judgment of the academic profession upon his dismissal. It is apparent, however, that at Reed College today there is no feeling of need for external assistance in establishing the principles of academic freedom.

As a result of Professor Moore's case, and pursuant to action of the Board of Trustees, the following paragraph appears in all letters of appointment to the faculty:

> It is only fair to inform everyone who plans to join the Faculty of Reed College that a state law of Oregon requires the signing of a certain oath or legal affirmation, a copy of which is given on the enclosed sheet for your information. Attention is also called to the official attitude of the Board of Trustees of Reed relative to membership in the Communist Party. There is of course no desire to conduct any inquiry into individual opinions or to limit freedom of speech.

An information sheet for prospective faculty members is attached to the appointment letter. It reads as follows:

> 1. In conformity with an Oregon statute passed in 1921, it is necessary for each college teacher when beginning his service to sign before a notary the following oath or affirmation:
>
> "I solemnly swear, or affirm, that I will support the constitution of the State of Oregon . . . and the laws enacted thereunder, and that I will teach, by precept and example, respect for the flags of the United States and of the State of Oregon; . . . reverence for law and order and undivided allegiance to the government of the country, the United States of America."
>
> A special form will be supplied at Reed College in the President's Office.
>
> 2. The trustees of Reed College have officially expressed the opinion that "membership in the Communist Party today is not consistent with membership in a college faculty"; and on August 13, 1954 they officially declared: "It has never been the policy of this Board of Trustees

to knowingly employ or to retain as a member of the Faculty a member of the Communist Party." New members of the faculty are not asked to make any statement concerning this matter; but it is essential that they be informed as to the policy of the Board.

VII. Conclusion

It is our considered opinion from all information available to us that Professor Moore's case did not receive a sufficiently broad determination on the basis of permissible standards. Our conclusion is that the Board acted without adequate consideration of all relevant factors. Assuming, as we do, that there was a failure of professional duty on the part of Professor Moore in remaining silent, the Board erred in making no finding concerning, and hence not explicitly weighing, either Professor Moore's record of service or the motives he may have had for refusing to answer the questions put to him. In the case of Professor X, the Trustees said: ". . . we think that in a case of this kind reliable evidences of good character and conduct should be weighed together with allegations of misconduct." A sober second look at the situation will broaden this to read: "Reliable evidence of good character and conduct should be weighed together with even *established* misconduct."

Interestingly, a clearer separation of the roles of the administration, faculty, and Board would have contributed to a better handling of the case. There is something wrong with a procedure which does not yield an arm's-length consideration of all the relevant factors, and which does not include a hearing of specific charges against the faculty member before a tribunal of his peers. The weighing of the relevant factors would have been more certainly accomplished in the instant case if the Board had not insisted on being an original party to the charges, but rather had allowed the President to draw the charges, and had allowed the Faculty Council to try them before they were considered by the Board.

Evidence is not wanting that the administration of Reed College has been scrupulous to uphold the principles of academic freedom and tenure when these have been made clear. The "fault" of the Board in this case stems fundamentally not from a lack of desire to follow the 1940 Statement of Principles to its best ability, but from uncertainty about the Statement's recommendations when an effort was made to apply them to a problem not anticipated by their original framers. The 1956 report of the Association's Special Committee has since become available.

We think there is basis for confidence that today Reed College would follow the principle that failure of professional duty of the instant nature is to be evaluated in each case by the full record of the individual

faculty member. We believe it would examine the effects of faculty conduct upon the reputation of the College with similar caution. We have no doubt that its administration understands that a decision not clearly based on the principles of academic freedom and tenure and the merits of the individual case tends, as an act of the institution, to damage the reputation of the College more seriously than the act of a single faculty member.

J. KEITH MANN (Law), Stanford University, *Chairman*
ROBERT J. LAMPMAN (Economics), University of Washington
EDWARD C. MOORE (Philosophy), University of Idaho

Dickinson College

On March 19, 1956, Dr. William W. Edel, President of Dickinson College, at Carlisle, Pennsylvania, announced the suspension of Dr. Laurent R. LaVallee, Assistant Professor of Economics on a one-year appointment; salary was to continue pending action by the Board of Trustees. On April 2, the President filed charges with the Executive Committee of the Board; on April 20, the Executive Committee held a hearing; and on June 1, the Board, on recommendation of its Executive Committee, dismissed Professor LaVallee as of that date, his salary to continue until the termination of his contract on June 30.

The events preceding these actions by the College Administration are outlined in the paragraphs which follow.

Professor LaVallee was appointed to the Dickinson College faculty in the fall of 1955. In December, 1955, a witness before the Un-American Activities Committee of the United States House of Representatives stated that Professor LaVallee had been a member of the Communist Party some time between 1942 and 1944 while employed by the National War Labor Board, in Denver, Colorado. On December 23, 1955, in an interview with the President of the College, Professor LaVallee stated that he had received a subpoena from the House Committee, and expressed anxiety about the possible effect on the College of the publicity that might ensue. At a second meeting, a few days later, Professor LaVallee assured the President that he was not and had never been either a member of the Communist Party or a "fellow traveler," but that he might nevertheless invoke the Fifth Amendment when the time came for him to testify before the House Committee.

Early in February, 1956, without the knowledge of Professor LaVallee, President Edel consulted with the staff of the House Committee in Washington. On February 24, he summoned Professor LaVallee to a conference and asked him what he intended to testify before the House Committee. The latter replied that he had been advised by counsel to plead the Fifth Amendment. The President said that such a plea might affect his reappointment, advised him to cooperate fully with the Committee, said that if he testified to having been a Communist but having severed all connection with the Communist Party, and if he now showed his willingness to oppose it by cooperating with the Committee, he would support him—*i.e.*, would recommend his reappointment after

his present appointment expired, on June 30, 1956. Reminding Professor LaVallee that in a previous conference he had denied having been a Communist, President Edel also promised him his support should he make a similar denial before the House Committee, unless convincing evidence to the contrary were presented to the Committee under oath. He informed Professor LaVallee that he had conferred with the staff of the Committee, and that in his opinion they would be able to present sworn testimony from a number of Professor LaVallee's former associates which would make it appear that his denial of Communist activity was not a true statement. He stated that, if this testimony were produced, it probably would convince him that Professor LaVallee had not told the truth.

On March 1, 1956, Professor LaVallee appeared before the House Committee in Washington and, in response to a question whether he then was or ever had been a member of the Communist Party, pleaded the Fifth Amendment. On March 9, President Edel again summoned him to a conference, at which he was asked and answered various questions concerning his appearance before the Committee. Dr. Edel then asked him a question, or questions, concerning his opinions about the nature of the Communist Party. At this point, Professor LaVallee lost his temper, and accused the President of conducting an inquisition. On March 19, a final conference between the two men took place, at which, at the suggestion of fellow faculty members, Professor LaVallee offered to sign a statement that he was not then, and had not been since his appointment at Dickinson College, a member of the Communist Party. President Edel invited him, instead, to sign a statement that he had never been a member, but this he subsequently declined to do on the advice of counsel that such a statement could lead to loss of the protection afforded him by his Fifth Amendment plea before the House Committee. Other persons were present at most of these conferences, and no significant disagreement exists as to what occurred.

On March 19, 1956, at a faculty meeting, the President announced the suspension of Professor LaVallee as unfit, on the ground that he had been identified by a witness before the House Committee as having been a member of a Communist cell in Denver between 1942 and 1944; that pertinent documentary evidence had also been produced before the Committee; that while he had offered the College a signed statement that he was not then a Communist, he had refused the College a statement that he never had been a Communist; and that in the course of conferences with the President, he had evaded identification of the Communist Party as a conspiracy. President Edel did not describe the nature of the documentary evidence just mentioned, which in fact consisted of applications for federal employment made by Professor LaVallee

in or about the year 1942. Professor LaVallee had not been given prior notice that his suspension would be announced at the faculty meeting; nor was the text of the announcement of his suspension, as read by the President to the meeting, made available to him.

On April 2, 1956, in accordance with procedure specified in the College Bylaws, President Edel filed charges against Professor LaVallee with the Board of Trustees. Professor LaVallee was supplied with a copy of the charges, was given notice of a hearing before the Executive Committee of the Board, and was informed that he might be represented by counsel, might testify in his own behalf, and might call other witnesses. The hearing was held in Harrisburg on April 20 before thirteen members of the Executive Committee. The President and Vice-President of the College, although members of the Executive Committee, were called upon to testify, and therefore disqualified themselves. Both the College Administration and Professor LaVallee were represented by counsel. The seven members of a Faculty Committee on Academic Freedom and Tenure were present by invitation, were given an opportunity to make statements at the conclusion of the hearing, and subsequently submitted a report to the full Board of Trustees, but took no other part in the hearing or in the final decision. (One member of the Faculty Committee had testified at the hearing, and therefore disqualified himself from participating in the report.) A representative of the student body also was present, but the hearing was closed to others. After the hearing, counsel submitted briefs for the guidance of the Executive Committee. On June 1, the Executive Committee, by unanimous vote of the thirteen members who had conducted the hearing, submitted a written report to the Board, recommending the dismissal of Professor LaVallee. This report was accepted by the Board.

To assemble the above facts, and to obtain a basis for judging them, the undersigned committee of the American Association of University Professors, or members of the committee, spent three days in Carlisle and Harrisburg and two in Philadelphia. Committee members interviewed Professor LaVallee, President Edel, numerous members of the faculty of Dickinson College, five of the Trustees, and counsel for Professor LaVallee and for the College. In addition, they examined the transcript of the hearing, briefs of counsel, minutes of faculty meetings, and other pertinent documents.

The committee's findings will be set forth in the following pages under two heads—Academic Due Process, and The Refusal to Testify.

Academic Due Process

The first interview between President Edel and Professor LaVallee, on December 23, 1955, was sought by the latter, and the first two inter-

views appear to have been of such a nature as to imply a confidential relationship. Therefore, when President Edel conferred with the staff of the House Committee without first informing Professor LaVallee of his intentions, he committed an error of judgment, which well may have destroyed Professor LaVallee's confidence in his good will, reduced the usefulness of later conferences, and made it more difficult for Professor LaVallee to defend himself.

Professor LaVallee's conduct during the interviews with President Edel later became the subject of certain of the charges against him. President Edel might have been expected to realize at the time these interviews occurred that charges might later be based upon them, and at some point—probably not later than the interview of February 24—he ought to have warned Professor LaVallee explicitly of this possibility.

Professor LaVallee was suspended by President Edel on March 19, in an announcement made at a faculty meeting. There is nothing of record to suggest that Professor LaVallee's unfitness, if any, was of a kind to prejudice his teaching, and the use of this extreme measure was not justified in any part of the President's notice of suspension. At another meeting, on March 21, the faculty resolved that the necessity of a suspension had not been demonstrated, and requested that it be lifted. This was not done. Although it is difficult to estimate the effect of the suspension on the ultimate decision in the case, its use in the present instance was not in accordance with the standards of academic due process in dismissal proceedings. It should be said in the Administration's favor that, in suspending Professor LaVallee, it automatically accorded him the privilege of a hearing, in accordance with the Bylaws of the College. Had it not chosen to suspend him, it could (since he did not have tenure) simply have refrained from reappointing him for the following academic year.

On the other hand, the manner in which the suspension was announced must be seriously criticized on three grounds. First, Professor LaVallee should have been notified of his forthcoming suspension in advance of the announcement in open faculty meeting. Second, he should have been supplied with a copy of the announcement containing the grounds for suspension. Third, and most seriously, President Edel should not have implied that documentary evidence had been produced before the House Committee which tended to establish Professor LaVallee's Communist affiliation. As explained above, the documents concerned were job applications. They contained denials of membership in the Communist Party and could not in themselves have proved that Professor LaVallee was or ever had been a Communist. As later became clear, their significance lay in the fact that Professor LaVallee had refused, in appearances before the House Committee and President Edel, to acknowledge his signature to them. At the time of the suspension, President Edel did not elucidate this point, with the result that his

announcement gave the mistaken impression that documentary proof existed of Professor LaVallee's Communist affiliation. Prejudice must have resulted in the minds of some faculty members.

The charges against Professor LaVallee may be summarized as follows. They alleged:

1. Insubordination, in that Professor LaVallee had refused to answer questions put to him by President Edel about his past associations, or to sign statements, and that he had (in effect) lost his temper;
2. Incompetence, in that, again, he had refused to answer questions; and in that he had refused to identify his signature;
3. Disloyalty to the United States and to Dickinson College, in that, once more, he had refused to answer questions; in that he had obtained letters of recommendation from persons he knew to have been Communists; in that he had complained that false evidence would be fabricated against him if he testified before a Congressional Committee; and in that he had illegally claimed the protection of the Fifth Amendment.

The charges must be criticized as poorly drawn, repetitive, and insufficiently specific. In the first place, a professor is under contract to his institution, but is not in any ordinary sense subject to its discipline. Some violations of contract may perhaps justify a charge of insubordination, but a refusal to answer questions or to sign statements, even when the refusal is accompanied by discourtesy, does not in itself substantiate such a charge. In the second place, no serious attempt was made to establish the charge of disloyalty, either to the College or to the United States. In any case, loyalty is hard to define objectively: attempts to make it a criterion of conduct lead too easily toward the conformer's strait jacket, and identification of the loyal as those who do not criticize. In this committee's view, therefore, the only substantial question at issue relates to Professor LaVallee's competence.

At the hearing before the Executive Committee on April 20, President Edel was called to testify, apparently in an attempt to establish the charge of insubordination, based upon Professor LaVallee's unwillingness, in conferences, to discuss Communism, his discourtesy during interviews, and his unwillingness to sign a statement, as outlined earlier in this report. Professor LaVallee himself was then called, not by his own counsel, but by counsel for the College, with the unfortunate result that he never had an opportunity to develop his own position in a coherent way. For this and other reasons the transcript conveys an impression that the presiding officer gave more latitude to counsel for the College than to counsel for Professor LaVallee, and at points failed to furnish the latter with the protection to which, as a witness, he was entitled. Moreover, incompetent evidence was admitted, in the form of statements made by President Edel to Professor LaVallee about what he had been told by the staff of the House Committee, al-

though a review of the transcript and the testimony of persons present point to the conclusion that such evidence did not influence the result. In addition to reviewing the transcript of the hearing, members of the Association's committee talked with the President, with counsel, with the faculty members and the student representative who were present, and with four members of the Executive Committee of the Board. The committee believes that the hearing, although in a broad sense "fair," suffered from numerous procedural defects. These defects may have contributed to Professor LaVallee's refusal to answer certain questions at the hearing, but it is doubtful that—unless he had answered the questions put to him—a different conclusion would have been reached had the hearing been free from these defects. Professor LaVallee's refusal to testify is discussed more fully below.

Lack of a proper sense of responsibility was shown, in the judgment of this committee, by a trustee, Judge Robert E. Woodside, who addressed a College alumni group in Harrisburg on May 3, after the hearing of April 20 but before the Executive Committee (of which he was a member) had submitted its report to the Board of Trustees on June 1. Judge Woodside disclaimed any intention of discussing the pending case; but he chose the Fifth Amendment for his theme, and in his address he took the position that employees who claimed the privilege should be dismissed, and that they were not entitled to the public sympathy they received. The speech was reported in the press, and could have prejudiced the outcome of the case.

The report of the Executive Committee recommending the dismissal contains significant omissions. The charges, proof of which was ostensibly offered at the hearing, included twelve items of complaint under the heads of insubordination, incompetence, and disloyalty. It seems unfortunate that the Executive Committee, in rendering its decision, made no explicit statement as to which of these items it regarded as proved, and which as not proved, by evidence at the hearing. As an example, one of the items of complaint under the heading of disloyalty read: "You obtained letters of recommendation from persons known by you to have been Communists in order to procure your position at Dickinson College." It should first be noted that the "persons" in question narrowed down to a single individual, since only one person who submitted a letter of recommendation was alleged to be a Communist at any point in the record. It is understood that this individual was investigated by the Board of Trustees at his own institution pursuant to charges, and was retained in his faculty position. The Executive Committee at Dickinson College did not go beyond Professor LaVallee's refusal to acknowledge that he knew this person, and this charge was thus left unexplored.

The failure of the Executive Committee to consider, in its report,

the charges individually leaves the status of several of the subheads in doubt. It is indeed plain that the Committee regarded Professor LaVallee's incompetence as established, but the report makes no explicit judgment upon the issues of insubordination and disloyalty, and the reader is left to assume from its silence that the Executive Committee regarded these charges as not proved. To take cognizance of charges of this order, including a charge of disloyalty to the United States, and to fail to decide explicitly whether or not these charges are substantiated by the evidence, argues a serious lack of responsibility upon the part of the tribunal.

The 1940 Statement of Principles provides that a dismissal case "should, if possible, be considered by both a faculty committee and the governing board"; and the Association has long emphasized the importance of faculty participation in dismissal proceedings. In the present case, a faculty committee attended the hearing, and could then or later have condemned the proceedings as grossly unfair or have claimed a miscarriage of justice, had it felt such a judgment appropriate. (In saying this, the committee does not commend the *ad hoc* nature of the participation of the Faculty Commitee on Academic Freedom and Tenure, nor does it imply that, by failing to protest the numerous and serious procedural shortcomings, this Faculty Committee could be deemed to have surrendered Professor LaVallee's rights in the matter.) Further, the Faculty Committee was offered the opportunity, albeit at a late hour at the end of a long hearing, to make any statements its members wished. Finally, the Faculty Committee examined the twelve items of complaint, and concluded that the charges of insubordination, incompetence, and disloyalty were not substantiated. It characterized Professor LaVallee's refusal to testify on many points at the hearing as "imprudent and uncooperative," but considered that his silence did not provide a basis for dismissal. It recommended that he be given a one-year instead of the three-year appointment customary for faculty members of his rank.

The Executive Committee of the Board reached an opposite conclusion from that of the Faculty Committee. Whether, during its deliberations, the Executive Committee gave serious attention to the opinions of the Faculty Committee seems impossible to determine. Certainly its failure to deal explicitly with the positions taken in the report of the Faculty Committee is a defect.

It has been necessary to consider the defects in the report of the Executive Committee at some length, because this report was, for practical purposes, the only document available to the full 48-member Board of Trustees when it acted to dismiss Professor LaVallee. The report of

the Faculty Committee was distributed to the full Board, but not in time for adequate consideration. The transcript of the hearing and the briefs of counsel were not available to Board members other than those who were also members of the Executive Committee.

As concerns faculty participation in the case, the conclusions of the investigating committee are as follows: The College charter conforms to common practice by placing final responsibility for dismissal with the Board of Trustees; neither charter nor Bylaws require faculty participation, or even consultation. In the present case, faculty representatives were accorded an opportunity at the hearing to observe the procedure and to express their views, and subsequently to submit their recommendations. On the other hand, members of the faculty were not allowed to hold a hearing of their own; nor, at the hearing conducted by the trustees, were they invited to question witnesses. The degree of faculty participation in the present case fell short of the prevalent practice in American colleges today, although it represented an advance on the procedure envisaged in the Bylaws.

Consideration of the numerous and serious violations of academic due process detailed above might seem to suggest that their influence on the outcome was decisive. Such, however, is not the conclusion of the investigating committee, for this reason: The Board of Trustees based the dismissal upon Professor LaVallee's refusal to answer questions at the hearing; therefore, the relation of the procedural violations to the decision of the Board depends on the extent these violations were the cause of, or furnished a justification for, Professor LaVallee's refusal to testify.

The Refusal to Testify

In its report to the Board of Trustees recommending dismissal, the Executive Committee of the Board based its position primarily upon Professor LaVallee's refusal to testify:

> The opinion of the Executive Committee is not based upon the fact that Dr. LaVallee pleaded the Fifth Amendment.
>
> The record of the hearing on April 20, 1956 shows that Dr. LaVallee refused to answer questions concerning his past associations and his opinion or his beliefs as to Communism, although he admitted the right of counsel at the Executive Committee meeting to ask the questions; that he refused to sign a written (although not a sworn) statement to confirm a statement made orally to President Edel that he was not a Communist and never had been one; that when asked by President Edel that he state his opinion as to the purposes of the Communist Party, he replied that the "Communist Party is a political party as are the Republican, Democratic, or Socialist Party, and not a conspiracy against the survival of the United States"; and on another occasion he stated that

the question of President Edel was an "inquisition" and that President Edel was being "another McCarthy"; that he refused to state whether or not he had ever been associated with certain persons identified in sworn testimony as Communists; that he refused to identify to Dr. Edel his own signature on documents relating to his former employment by the government of the United States in the civil service, although he later admitted that the signatures were his and almost immediately thereafter refused to identify them; that he claimed that if he testified before a Congressional committee false evidence would be fabricated against him and that this has been done against others; and that his actions in his interviews with President Edel, at some of which other members of the faculty of the College were present, impugned his loyalty to the College; and that he refused at the hearing to answer questions at to whether he knows faculty members in other institutions who had written recommendations of him.

It should be noted in passing that the record fails to show that Professor LaVallee ever said that the "Communist Party is . . . not a conspiracy against the survival of the United States." However that may be, it is the judgment of the investigating committee that the above specifications, other than Professor LaVallee's failure to disclose information, cannot be given appreciable weight. They are either not serious enough to form the basis for dismissal (Professor LaVallee's intemperate and ill-considered behavior in one interview with the President), or not clearly supported by the evidence presented (whether or not Professor LaVallee claimed that false evidence would be fabricated by the House Committee), or ambiguous in content (disloyalty to the College in his interview with the President). All of the evidence presented as to Professor LaVallee's proficiency as a teacher and his ability as a scholar was favorable. There was no evidence of bias in his teaching; indeed, positive evidence was introduced by his counsel that his conduct in this regard was beyond reproach. In his initial interviews with President Edel, he was evidently open and candid in his responses. We are left with his refusal to agree with President Edel as to the conspirational nature of the Communist Party, and to answer certain questions at the hearing before the Executive Committee, as the sole possible basis of dismissal.

At the hearing, Professor LaVallee refused to answer many questions put to him. The report of the Executive Committee of the Board recommending his dismissal states that his "failure to disclose information to the College both in his interviews with [the President] and with other members of the College administration, especially concerning his past associations, and his evasive attitude throughout the hearing before the Executive Committee on April 20, 1956, clearly disqualify him from being a member of the faculty of the College." Since the questions put to Professor LaVallee on earlier occasions were repeated at the hearing, it will be sufficient to discuss his refusal to answer at the hearing.

The Forty-second Annual Meeting of the American Association of University Professors put itself on record in this matter by approving the pertinent part of a report submitted by a Special Committee on Academic Freedom and Tenure in the Quest for National Security.[1] It is there stated:

> The fact that a faculty member has refused to disclose information to his own institution is relevant to the question of fitness to teach, but not decisive. . . . [A] refusal to answer questions which arises from a sincere belief that a teacher is entitled to withhold even from his own institution his political and social views should be accorded respect and should be weighed with other factors in the determination of his fitness to teach.

Clearly, the purpose and relevance of the questions, the reasons for the refusal to answer, and the weight given by the tribunal to the refusal and the reasons therefor, must be evaluated.

At the hearing before the Executive Committee, Professor LaVallee declined to answer all questions dealing with his alleged membership in the Communist Party, his acquaintance with particular individuals, and his opinions concerning the nature of the Communist Party and its teachings. Among such unanswered questions may be instanced: whether or not he had been professionally associated with a man whose name he had given as a reference in applying for his position at Dickinson College; how he would answer a student who asked whether the Communist Party advocates the overthrow of government; and whether, while at Dickinson College, he had been in contact with any person or persons believed by him to be subversive. The members of this committee, in varying degrees, believe that the College might reasonably claim it needed answers to these questions in order to determine Professor LaVallee's fitness to teach. It seems reasonable to hold that questions regarding the nature of Communism may properly be put to a man teaching in one of the social sciences, and that questions concerning persons who provided references for a faculty appointment fall outside the realm of privileged personal association, and are thus proper.

Why did Professor LaVallee refuse to answer such questions as these? It is especially difficult to assess his motives, since he advanced several different explanations. At the hearing, he was repeatedly asked why he would not answer. The reasons he gave were these: (1) He considered that he was under pressure; (2) he considered that his competence should be judged from his teaching record and not from questions asked at the hearing; (3) as a matter of conscience, he felt that he should not be called upon to discuss his political views and personal associations.

[1] *AAUP Bulletin*, Spring, 1956, pp. 49-107; especially, Section B, Relevant General Principles, paragraph 9 (p. 60): The faculty member's obligation of disclosure.

There is no evidence that Professor LaVallee was under unreasonable pressure at the hearing, although the procedural shortcomings discussed above may have contributed to such a feeling on his part. The availability of other tests of competence does not absolve a faculty member of the responsibility for answering questions actually relevant to his fitness. It would seem that questions regarding Professor LaVallee's professional references, or falling within the area of his academic competence, could have been answered without revealing his personal political beliefs and associations. In sum, the committee finds that, although the reasons offered may have stemmed from sincere beliefs in a right to personal privacy, and thus must be accorded some measure of respect, they did not justify his refusal to answer.

Evidence of Professor LaVallee's sincerity may be derived from an incident in which he damaged his own case. At one point during the hearing, his counsel offered in evidence certain letters from former colleagues which recommended him most highly. Counsel for the College objected to the introduction of these letters unless Professor LaVallee would discuss his acquaintance with the writers of the letters; and it appeared that the letters would not be received in evidence unless he did so. The Chairman of the Executive Committee asked whether he knew the writers of the letters. Although he realized that his failure to answer might result in the exclusion of evidence favorable to him, he declined to answer, as he had declined consistently throughout the hearing to discuss his personal or professional associations. At another point, although he refused to answer whether, while at Dickinson College, he had been in contact with any person or persons believed by him to be subversive, he answered the questions following this, denying that he had ever attempted to enlist any student or teacher into the Communist Party or any other subversive organization, and disclaiming any knowledge of anyone who wished to overthrow the Government. In short, no evidence has appeared that Professor LaVallee was insincere, or that he was not acting in accordance with what he felt to be his own conscience; nor is there any seeming basis for concluding that he was endeavoring to withhold evidence of illegal conduct.

The assertion by a faculty member of the right to withhold from his institution information which is pertinent to his fitness casts upon him the burden of explaining his refusal. Although there seems to be no question of Professor LaVallee's sincerity, the members of the investigating committee do not feel that he discharged this burden adequately, and they believe that his attitude at the hearing was evasive, in that he claimed the right of silence on matters relevant to the determination of his fitness and not covered by his declared scruples of conscience. Three unanswered questions have been cited above (p. 146) as examples of his silence on such matters.

What weight was given by the tribunal to the refusal to testify? The report by the Executive Committee of the Board treats Professor LaVallee's refusal to disclose information as sufficient in itself to warrant a finding of incompetence. This report does not refer to any other evidence presented at the hearing and left unchallenged as a result of his refusal to answer certain of the questions put to him. There is no discussion of whether or not the questions he was asked were proper questions, or whether the reasons he gave for refusing to answer were valid reasons. Nor does the report explain why the Executive Committee believed his silence significant. There is no sign that the Board accorded any respect at all to Professor LaVallee's belief that he was entitled to withhold answers to certain types of question. Consequently, it seems clear that the Board found the mere failure to answer questions, which it considered relevant to his fitness, sufficient ground for his dismissal. The judgment rendered by the Board was therefore deficient in a vital respect.

Faculty-Administration Relations at Dickinson College

There can be no doubt that from the beginning a substantial majority of the faculty felt a marked lack of confidence that the President and Trustees could be expected to handle the case in an acceptable fashion. The Administration, in turn, was aware of this feeling and, not unnaturally, resented it. For this situation, the absence of formal, prearranged machinery for faculty-consultation in a case of the kind must be held partly responsible. Although there existed no fewer than twelve standing committees of the faculty, there was no committee on academic freedom and tenure until it was decided to establish one at a meeting of the faculty on March 5, 1956. But the representativeness and impartiality of an *ad hoc* committee, elected to deal with a particular situation, are always subject to question. The Faculty Committee would have been more useful to both faculty and Administration in the present case had it already been in existence at the advent of the situation with which it had to deal, and had it consisted of regularly elected members with staggered terms, as is the case with other standing committees of the Dickinson College faculty. Recently, the Administration of the College has recognized the merits of this viewpoint, and has encouraged the faculty to establish a standing Committee on Academic Freedom and Tenure of seven elected members, with staggered three-year terms.

The College also suffered, when the present case arose, from the absence of formal provision for faculty participation in dismissal proceedings. On March 27, 1956, the President wrote to the Board of Trustees to announce the suspension of Professor LaVallee; he recommended that, at the hearing required by the Bylaws of the College, the

newly-formed Faculty Committee on Academic Freedom and Tenure be invited to take an active part; and he further recommended that in reaching its conclusions the Executive Committee of the Board give careful consideration to the judgment of the Faculty Committee. It was presumably in response to this suggestion by the President that the Chairman of the Board subsequently invited the Faculty Committee to attend the hearing.

When the case arose, the atmosphere at the College would have been improved, and mutual confidence between faculty and Administration would have been greater, had faculty participation been a right accorded by the Board of Trustees in a pre-existing Bylaw, instead of a privilege extended at the request of the President and at the discretion of the Board. On March 21, 1956, the faculty passed a resolution asking the Trustees to modify the Bylaws so as to require the President, in dismissal cases, to bring charges before a specially constituted faculty committee. The proposal was rejected by the Board at its meeting of June 1, 1956, on the ground that it violated the charter of the College. The reason given for rejection implies misunderstanding of the faculty's proposal, which did not ask the Trustees to abdicate their authority, but merely sought to assure the faculty of an opportunity to inform itself about a case and to express a judgment concerning it.

In many American colleges, the president is required to refer a dismissal case to a faculty committee for inquiry and report, prior to bringing it to the trustees for final action. In the *ad hoc* procedure used at Dickinson College in the present instance, an elected faculty committee attended the hearing before the Trustees in a capacity that may perhaps best be described as "friend of the court." The Association has not taken a position as to what method of securing faculty participation is to be preferred, but its experience has indicated the advantage of a procedure that the faculty of the institution has endorsed prior to the occurrence of a particular case. The investigating committee found both the College administration, and all of the trustees with whom it talked, sympathetic to the view that faculty participation in any future dismissal case should be accorded as a right, through suitable amendment of the Dickinson College Bylaws. The committee recommends that at an early date the President, after consultation with the new standing Committee on Academic Freedom and Tenure, propose to the Trustees such an amendment of the Bylaws.

Effects of the Case Upon Dickinson College

In a case of this kind, it probably is inevitable that some faculty members who have advised the suspended professor, who have pressed

for faculty consultation, or who testified at the hearing, should believe that they have prejudiced their prospects at the College. In the present instance, several persons who did not possess tenure were elected to the Faculty Committee on Academic Freedom and Tenure, which, as stated above, was set up only after the case had come to light. In general, the best practice requires that members of any faculty committee elected to deal with tenure questions, or indeed to advise upon or discuss with the president or trustees any serious matter, should be persons with tenure.

The committee is satisfied that, as a result of events at Dickinson College while the case of Professor LaVallee was under consideration, several faculty members have come to feel that there is no future for them at the institution. Several alleged instances of discrimination against faculty members who had been critical of the Administration's handling of the present case were brought to the committee's attention. The committee took careful notice of all such allegations, and made such investigation as was open to it. Allegations of this kind are, admittedly, difficult to prove or disprove. No substantial basis was found for believing that, up to the time of the investigation, discrimination had occurred against any faculty member on account of his attitude during the case. The fact remains, however, that some of Dickinson's ablest and most devoted teachers have chosen to move elsewhere. If the President and Trustees have striven to be fair to those who differed with them, they have not succeeded in fully convincing the faculty of this fact.

HAROLD BARGER (Economics), Columbia University, *Chairman*
HAROLD W. KUHN (Mathematics), Bryn Mawr College
WILLIAM F. SCHULZ, JR. (Law), University of Pittsburgh

The University of Southern California

In June of 1957, the undersigned, as a committee of the American Association of University Professors, visited the University of Southern California to investigate the suspension of Mr. Andries Deinum from the faculty of that institution in the summer of 1955, and his nonreappointment for the following year. At the time of his suspension, Mr. Deinum, an instructor in cinema, had just completed a teaching assignment at the University during the regular academic year, and was serving under a summer session appointment. He was paid in full for the summer session, despite the suspension. Prior to his suspension, in late June, he had received no word that his appointment would not be renewed for the following academic year. Indeed, Mr. Deinum's reappointment and promotion to the rank of assistant professor had earlier been recommended by the appropriate University authorities and, at the time of the decision to suspend him, had been awaiting only the final approval of Dr. Albert S. Raubenheimer, the Vice-President for Educational Affairs.

The officers of the University received the members of the investigating committee cordially, and assisted them in making arrangements to interview appropriate members of the faculty and of the Administration. Transcripts of all the relevant documents in the case were made available, either by officers and teachers of the University, or by Mr. Deinum. This committee found no evidence of any lack of good feeling between faculty and Administration, and there seemed to be a general belief that, except in this particular case under investigation, the University's policies and practices respecting academic freedom and tenure had conformed generally with the principles supported by the American Association of University Professors, the Association of American Colleges, and other associations concerned with higher education.

II

Mr. Deinum appeared as a witness before the Un-American Activities Committee of the United States House of Representatives on June 27, 1955. In response to some of the questions addressed to him, Mr. Deinum declined to answer "on the grounds of the First Amendment,

supplemented by the Fifth." Later that day, the radio carried the news that the University had suspended him, and the next day he received a letter from Dr. Fred D. Fagg, Jr., President of the University of Southern California, written on the day of the hearing, informing him that he was being suspended from his summer teaching duties and that no provision existed for the continuance of his connection with the University thereafter.

When Mr. Deinum was subpoenaed to appear before the Congressional Committee, he sought the advice of a faculty member of the Law School, of the Vice-President for Educational Affairs, and of other members of the University Administration. He was advised by the administrative officers of the University that if he made a "clean breast of things" he would be continued on the faculty. In a brief conference with President Fagg a week after his suspension, he was advised to write out a full statement of his position and of his reasons for invoking the Fifth Amendment. He submitted such a statement on July 5, 1955. When it appeared that no action was to be taken on this statement, Mr. Deinum wrote to the Executive Committee of the University Senate, on August 22, 1955, requesting a hearing. A month later, on September 22, 1955, the University Senate Executive Committee recommended that "no further action should be taken" and no hearing be granted. Mr. Deinum protested the Committee's decision in a letter published in the campus newspaper, and this resulted in a reversal of the Executive Committee's decision, at a meeting of the University Senate on October 19, 1955. A Special Committee was then appointed by the Senate to hold hearings, to determine whether Mr. Deinum had received academic due process.

In its report of December 11, 1955, the Special University Senate Committee on the Deinum case indicated that it had confined its investigation to ascertaining the University's policy regarding the use of the Fifth Amendment, and to determining whether Mr. Deinum had been clearly informed of this policy and accorded procedural due process under it. The Committee ascertained that two weeks before Mr. Deinum had appeared as a witness before the Congressional Committee, Vice-Presidents Raubenheimer and Earl C. Bolton had been advised by President Fagg and the Chairman of the Board of Trustees, Mr. Asa Call, that "if Deinum refuses to cooperate with the House Committee and testify fully, he will be suspended; but if he 'comes clean' no disciplinary action will follow. . . ." The Special Committee also found "that no express statement, either oral or written, of the Administration's policy, namely 'if Mr. Deinum refuses to testify fully he will be suspended from his teaching position,' was ever communicated by the Administration to Mr. Deinum prior to his appearance before the House Committee, although the Administration feels strongly that the gravity of the consequences should have

been clear to Mr. Deinum from the nature of the discussion." The Special University Senate Committee concluded that the University's policy "requiring all persons to testify fully before duly constituted governmental bodies under penalty of suspension from the University" was known to Mr. Deinum by inference, and that "by his suspension and nonreappointment he was not deprived of his teaching position without cause."

In the matter of the failure to grant Mr. Deinum a hearing either before a faculty committee or a committee of the governing board, the Special University Senate Committee commented that "it would have been better procedure for the Administration to have called Mr. Deinum in for a final hearing before sanctions were imposed." However, the Special University Senate Committee concluded that the essentials of due process had been granted Mr. Deinum.

Although recommending "that no further action be taken by the University Senate in regard to the Deinum suspension during the summer of 1955, and his subsequent nonappointment for the year 1955–56," the Special University Senate Committee did recommend "that the University Senate ask the Administration to state in writing its present policy regarding the requirement of all faculty and staff members to testify fully before duly constituted governmental committees. . . ."

Immediately after the acceptance by the Senate of the report of the Special University Senate Committee, a second Special Committee was appointed to consider certain questions raised by Mr. Deinum's dismissal. The report of the second Special Committee was made on May 2, 1956, and was unanimously adopted by the University Senate. This report stated that:

> The University Senate requests that in cases where dismissal or failure to reappoint a faculty member is contemplated for reasons other than those normally associated with tenure, including situations arising from a refusal for any reason to answer questions before any governmental agency, a committee of the faculty be appointed by the President (after consultation with the Executive Committee of the University Senate) to investigate and make recommendations to the President.
>
> Refusal by a faculty member for any reason to answer questions before any governmental agency shall not, in itself, be grounds for dismissal or failure to reappoint, but may serve as a basis for an inquiry by the University into the faculty member's fitness.

The University's governing board appears to have taken no action in response to the Senate's recommendation, though Vice-President Raubenheimer informed the investigating committee that the Administrative Committee of the University did approve it.

III

The Association's investigating committee considers that, in suspend-

ing Mr. Deinum, the University's administrative officers appeared to be following a policy of automatically discharging faculty members who invoked the Fifth Amendment, on the ground that such persons were refusing "to cooperate fully with and answer all questions of any duly constituted governmental body." Such a policy was clearly inconsistent with the position taken by the American Association of University Professors, prior to the incident involved here, in resolutions adopted at its Annual Meetings in 1953, 1954, and 1955, stating that the use of the Fifth Amendment was "not, in and of itself, justifiable cause for the dismissal of [a] faculty member." This principle was reasserted in 1956, in the report of a special committee, submitted to the Forty-second Annual Meeting under the title "Academic Freedom and Tenure in the Quest for National Security." Much the same position was taken by the United States Supreme Court in April, 1956, in its decision in *Slochower* v. *The Board of Higher Education*, in which the Court held that the due process of law clause of the Fourteenth Amendment was violated by the summary dismissal, under New York law, of a teacher in a public institution of higher learning who had invoked the Fifth Amendment in refusing to testify before a Congressional committee. The more recent decision of the Supreme Court in *Watkins* v. *United States* casts doubt on the authority of the House Un-American Activities Committee to conduct the kind of hearing at which Mr. Deinum was questioned. It also upheld the right of a witness to refuse to answer questions whose pertinence to the subject of the investigation has not been made clear. To discharge a faculty member solely for refusing to answer a question it may not have been proper for the Congressional Committee to ask, and without further inquiry into the circumstances, was a clear violation of academic due process. On the factual side, it is conceded that there was no ground or reason for discharge other than the refusal to answer the questions of the Congressional Committee.

There is doubt, to say the least, whether the University Administration adequately informed Mr. Deinum, when he sought its advice, of the action it would take if he refused to answer the Congressional Committee's questions. Certainly no statement that invocation of the Fifth Amendment would be regarded as a basis for dismissal had been published; and none was made to him explicitly. It was difficult for the investigating committee, two years after the event, to ascertain precisely what the University's policy had been at the time of the Deinum case, or was at the time of its inquiry. In interviews with President Fagg, Vice-Presidents Raubenheimer and Bolton, and Dean Tracy E. Strevey, it was unable to secure a consistent statement with regard to the University's policy. Its members were told that the University had a definite policy, and that Mr. Deinum should have known this policy, but they were also

told that each case was handled on its own merits and that decisions in future cases involving use of the Fifth Amendment by faculty members would be made on the merits of each case. Although it cannot be asserted that an institution must specify all grounds of dismissal fully in advance, an issue as to such grounds, which has been properly presented, should be resolved with greater clarity than was done in this case at the University of Southern California. On the other hand, despite the inadequacy of the communication to Mr. Deinum, and the unwillingness of the administrative officials to give him unequivocal notice that he would be discharged if he failed to testify fully, it seems clear that he did in fact derive by inference an adequate appreciation of the probable consequences in his particular case of the course of action he chose to follow.

The 1940 Statement of Principles on Academic Freedom and Tenure provides: "Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case"; and "there should be a full stenographic record of the hearing available to the parties concerned." None of these conditions was met in the Deinum case. The conferences preceding his appearance as a witness, in which Mr. Deinum sought the advice of the Dean of his College and the Vice-Presidents for Educational Affairs and for Development, cannot reasonably be considered as a hearing, for an offense had not then been committed. Neither can these administrative officers be considered as either the faculty or governing board of the institution.

Since Mr. Deinum was an instructor on an annual appointment, it may be questioned whether the failure to renew his appointment was a termination for cause. However, the Administration indicated that it normally notified instructors in February if it did not intend to reappoint them for the following academic year. Moreover, Mr. Deinum had been advised by the chairman of his department that he had been recommended for the rank of assistant professor. His name had been read in faculty meeting as one of a group of persons who had been recommended for promotion. This committee was informed by Vice-President Raubenheimer that when Mr. Deinum first came to consult with him in June about his summons to appear before the Un-American Activities Committee, the forms for Mr. Deinum's reappointment were on Mr. Raubenheimer's desk for final signature. Action on the reappointment was withheld pending the outcome of the Congressional Committee hearing. It would thus appear that there was a mutual understanding between Mr. Deinum and University officers that an appointment for the next academic

year was to be offered to him. Hence it seems proper to conclude that Mr. Deinum should be regarded as having been subject to the protection of the principles that control dismissals for cause of teachers on term appointments. Moreover, his formal suspension was tantamount to a dismissal from at least the summer session faculty. It should also be noted that the American Association of University Professors has for years, in its operations in this area, taken the position that even a refusal to renew an annual appointment, if accompanied by a public statement of cause tantamount to charges likely to be injurious to the teacher's professional reputation, should be justified by a hearing.

Administrative officers of the University stated to the committee their belief that the requirement of a hearing set forth in the 1940 Statement of Principles does not apply unless the facts are in dispute. The committee agrees that the "where the facts are in dispute" clause of the 1940 Statement may seem to leave some doubt as to the exact conditions under which a hearing should be held. However, it seems clear that in most cases there cannot be a determination that the facts are not in dispute unless there is first a statement of charges that enables the faculty member to ascertain what facts are alleged. And, ordinarily, determination of the truth or falsity of the facts alleged requires a hearing. In the present case, the letter of dismissal was written by President Fagg on the very day of the Congressional Committee hearing, on the basis of a telephonic report of the hearing by Vice-President Bolton. There was no dispute about the fact of Mr. Deinum's appearance before the Congressional Committee, or the fact of his failure to answer certain of the Committee's questions, but he was not given an opportunity, except in a letter which followed a brief conference, to justify to the University Administration his use of the Constitutional privilege, or to offer other reasons for not answering certain questions asked of him. The real deficiency in the proceeding stemmed from the position taken by the University Administration that invocation of the Fifth Amendment in itself justified dismissal. It was this erroneous stand that appeared to place the facts beyond dispute and to make a hearing superfluous. Finally, irrespective of whether a hearing was needed to establish the facts, we have here a dismissal for cause which was not "considered by . . . a faculty committee." In short, the Administration's contention as to circumstances which may require a full-dress *hearing* should not be permitted to obscure the fact that Mr. Deinum did not receive even the minimum *consideration* indicated for such cases by the 1940 Statement of Principles.

IV

There appears to be no question that the Administration of the University of Southern California violated the applicable principles of aca-

demic freedom and due process in all three of the aspects mentioned above. The suspension and nonreappointment were based solely on Mr. Deinum's prior invocation of the Fifth Amendment. Mr. Deinum did not have adequate notice of the offense. The procedures accorded to him did not conform to the requirements of academic due process.

There appears to be strong support by the faculty of the University of Southern California for the principles of academic freedom and tenure that were violated by University officers in this case. Had the Administration been governed by the policy and procedures set forth in the University Senate resolution of May 2, 1956, there would now be less reason for criticism of its action; but even the resolution fails to assure an adequate hearing before dismissal. There seems to be some reason to believe that the Administration will be guided in the future by sound principles; but there is no assurance to this effect and no indication that Mr. Deinum will be restored to the position from which he was suspended.

President Fagg stated to the committee that Mr. Deinum's use of the Fifth Amendment was an indication "that he was not, in the fullest sense, a good American citizen." Mr. Raubenheimer indicated that the institution was very sensitive to the views of the public that supported it in the community of Los Angeles, and that to retain this support, it could not keep on its faculty people whom the community did not consider good citizens. Members of the faculty with whom the committee spoke indicated that there was no evidence, except in the Deinum case, of pressure by the Administration to make the faculty conform to a pattern of behavior acceptable to the community.

In the light of the recent Supreme Court decisions, it would appear that Mr. Deinum's conduct before the Congressional Committee met the obligations which our Constitution and laws require of a citizen. The House of Representatives did not cite Mr. Deinum for contempt.

The committee concludes that the Administration of the University of Southern California has done an injustice to Mr. Deinum and that it should see that steps are taken to make amends for the damage that was done to him. University trustees should also be asked to accept in some formal manner the policy recommendation of the University Senate and formally to adopt satisfactory principles of academic freedom and tenure.

ROBERT B. BRODE (Physics), University of California, *Chairman*
ARTHUR R. KEMMERER (Nutrition), University of Arizona
SPENCER L. KIMBALL (Law), University of Michigan

Alabama Polytechnic Institute

On May 8, 1958, Bud R. Hutchinson, assistant professor of economics at Alabama Polytechnic Institute on a term appointment, was notified by his department chairman, Professor Charles P. Anson, that he would not be reappointed upon expiration of his contract, on June 15, 1957. In an interview with Professor Hutchinson on May 10, 1957, President Ralph B. Draughon confirmed this fact, and explained that it was the result of action taken by the Board of Trustees in executive session on March 14, 1957. He stated that the Board's decision not to renew the contract was based solely on Professor Hutchinson's action in writing a letter to the editor of *The Plainsman*, the student newspaper of Alabama Polytechnic Institute. This letter, which criticized a student editorial on school integration in New York City, had been published in the February 20, 1957 issue of *The Plainsman*.

On May 11, 1957, Professor Hutchinson addressed a letter to the General Secretary of the American Association of University Professors protesting the action, and sent a copy to the local chapter. On May 14, he sent a copy of substantially the same letter to the *Lee County Bulletin*, of Auburn, Alabama (where Alabama Polytechnic Institute is situated), and to the *Birmingham News*. The Auburn, Birmingham, Montgomery, and New York newspapers carried the story on May 15 and 16. On May 16, the Associate Secretary of the Association sent telegrams expressing the Association's concern to Governor James E. Folsom, the *ex officio* Chairman of the Board of Trustees of Alabama Polytechnic Institute, and to President Draughon. They replied, promising take the case up with the Board, but no action was then taken, or has since been taken by Alabama Polytechnic Institute, to reinstate Professor Hutchinson, who is now in Pasadena, California.

At the request of an informal committee of faculty members, the Board, on June 3, appointed a Special Committee of three members to meet with a faculty committee. The six members of the faculty committee were appointed by the Chairman of the General Faculty on June 5. The joint committee met on June 25 and prepared a new "Statement of Policy of the Board of Trustees on Academic Freedom, Tenure, and Responsibility," which was adopted by the Board on August 23, 1957, along with a new contract "Notice and Acceptance of Appointment." The joint committee did not consider the Hutchinson case.

The undersigned committee visited Auburn October 16–18. During the visit, the committee conferred at length with three members of the Institute's Board of Trustees, namely, Vice-Chairman Paul S. Haley and Mr. Frank P. Samford, both members of the special faculty-trustee committee which drew up the August 23 "Statement of Policy," and Mr. G. H. Wright; with President Ralph B. Draughon, Vice-President David W. Mullins, Dean of Faculties M. C. Huntley, Dean Roger W. Allen of the School of Science and Literature, and Professor Charles P. Anson, Head Professor of Economics, of the Institute's administration; Professor Norman A. Brittin, chairman of the General Faculty, who appointed the faculty members of the special faculty-trustee committee; four of the other six faculty members of the special faculty-trustee committee (Professors Oliver Turner Ivey, Albert T. Sprague, Jr., David H. Malone, and William S. Smith, who is currently president of the Institute's chapter of the American Association of University Professors); Professor William Myles, president of the local chapter, 1956–1957, and Professors D. B. Richards (Forestry), Robert R. Rea (History), Howard E. Carr (Physics), and Chester Hartwig (Sociology).

II

On February 13, the student newspaper, *The Plainsman*, published an editorial, "New York City Forces Integration," commenting upon the plans of the Commission on Integration of the New York City Board of Education. The editorial was apparently the personal responsibility of the student editor, and his choice of topic was regarded as exceptional, if not deplorable, by the administration. Alabama Polytechnic Institute, however, has a tradition of student freedom of the press. No censorship before publication existed, and there was no censure after publication of the editorial.

On February 20, *The Plainsman* published a long "letter to the editor" by Professor Hutchinson, commenting on the editorial, which, he wrote, "deals but superficially with an extremely complex problem." Most of the letter was simple exposition of the background of the report of the Commission, especially the Zoning and Teaching Assignment Reports, but the last two paragraphs were more critical:

> Now this is a real problem, one of concern to all men of good will, not just the NAACP and other "pressure" groups. What is difficult to understand is the reasoning of those persons who profess decency, a feeling for their fellow man and who boast of their moral standards, yet who nevertheless hesitate to join in the crusade to drive ignorance, poverty, and social injustice from our midst. Rather than sneer at the

attempts of the New York City Board of Education to cope with this social problem, all who really love humanity should strongly commend them for their courage and intelligence.

It will not be an easy task to re-zone or to assign teachers to the less fortunate schools, either for the Board or the teachers involved. But if assignment and re-zoning are necessary to carry out the task of educating the children of New York, all the children, black or white, rich or poor, then assignment and re-zoning must be supported by all who sincerely believe in education and social justice.

Professor Hutchinson signed with his name and his title, Assistant Professor of Economics.

Professor Hutchinson's letter resulted in several more letters to the editor. In the next issue of *The Plainsman,* a graduate student named Roy Russell suggested that Professor Hutchinson's employment be terminated if he was unhappy at Auburn. This in turn produced two signed letters in defense of Professor Hutchinson's right to speak his opinion. One student wrote: "It is a sad thing anywhere, much less at a college, when a person can't honestly express his views without some small minded person demanding that he be fired." A letter from an "alumnus" several weeks later in support of Russell was signed "Name withheld by request."

Some members of the faculty and administration who saw Professor Hutchinson's letter in *The Plainsman* thought it was "indiscreet," but expected that the slight commotion it had caused would very quickly pass. President Draughon did not see the letters in *The Plainsman,* and no member of his staff thought it important to call them to his attention. No member of the faculty interviewed by the committee had thought, as he read Professor Hutchinson's letter, that it might be considered ground for dismissal. The Dean of the School of Science and Literature, who had read the letter at the time it was published, had completely forgotten about it when he approved new contracts in March. The Board's action, when it was finally revealed, came as a complete surprise to faculty and administrators.

III

The Alabama Polytechnic Institute is governed by twelve trustees: the Governor and the State Superintendent of Education, *ex officio,* and ten additional trustees appointed by the Governor for twelve-year terms. At the meeting of the Board on March 14, 1957, the *ex officio* Chairman, Governor James E. Folsom, was not present. After the regular business of the Board had been disposed of, one member made an issue of Professor Hutchinson's letter. President Draughon, who was unaware of the existence of the letter, attempted to find a copy. The Board at that point

decided to go into executive session, and excluded the President, Vice-President, their secretaries, and reporters from the room. After twenty minutes of discussion, President Draughon was invited to return to the meeting and was instructed not to reappoint Professor Hutchinson. President Draughon told the Board that he could not do this without frankly disclosing to Professor Hutchinson the reason for the decision.

The three members of the Board of Trustees with whom the investigating committee talked insisted that a decision not to reappoint a probationary teacher is a matter on which the Board may exercise absolute discretion. They knew that the Board must respect tenure and had no right to discharge a professor having tenure without procedural due process, but did not understand that a teacher is entitled to academic freedom during his probationary period, and that failure to reappoint may involve a question of academic freedom. Professor Hutchison, they pointed out, did not have tenure, so that his dismissal, in their view, was entirely consonant with the provisions of the 1940 Statement of Principles on Academic Freedom and Tenure.

The Board members further insisted that even if the 1940 Statement had explicitly required a hearing in Professor Hutchinson's case, there were ample grounds on which to discharge him. They contended that in writing a letter to the editor a teacher acts "as a citizen." The 1940 Statement requires that he "should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman." The Board members argued that Professor Hutchinson's letter contained "inflammatory" statements, was "irresponsible," and flouted the "known opinion of the administration"[1] that any action that would involve the Alabama Polytechnic Institute in the race issue should be avoided. In addition, Professor Hutchinson not only did not dissociate himself from the institution, but attempted to clothe himself with institutional authority by adding his professorial rank and department to his signature. In response to a question from the committee, one member of the Board as-

[1] There is disagreement whether the opinion of the Administration was in fact known to Professor Hutchinson and the faculty. Professor Hutchinson said that he had never been told formally or informally that he was not free to speak his mind on the integration issue. In a letter to the General Secretary on February 6, 1958, President Draughon states that "Dr. Charles Anson, head professor [in the Economics Department], discussed with Mr. Hutchinson the very real tensions surrounding the integration question here in Alabama; advised Mr. Hutchinson that there was no disposition to interfere with his beliefs on that subject; warned that if he felt so strongly on the matter as to crusade, or get into controversy, it would be better that he not accept the offer of a position. Mr. Hutchinson accepted the appointment under these conditions, and subsequently departed from them. Mr. Hutchinson thereby, in the opinion of the Board of Trustees, became a controversial person whose opportunities for service and promotion at this institution were thereby hampered. . . ."

serted that if any professor, with or without tenure, should violate Paragraph (c) of the 1940 Statement as Professor Hutchinson had done, by agitation *on either side* of the segregation issue, the Trustees would feel themselves within their rights in preferring charges leading to his dismissal.

IV

The administrative officers of the Institute apparently concluded some time in April that the action of the Board could not be reversed and that Hutchinson's contract could not be renewed. Professor Hutchinson had no knowledge of this, however, until the notice by Professor Anson, on May 8, confirmed by President Draughon on May 10. The President's action in frankly revealing the basis of the Board's decision was consistent with his custom in dealing with decisions not to renew appointments, and was approved by the Board. His offer to write a letter of recommendation for Professor Hutchinson and to help him find a position with a better future may also have indicated a hope that Professor Hutchinson would voluntarily remove himself from Auburn.

After Professor Hutchinson's letters to the public press appeared, any hope of a reversal of the decision apparently ended. A students' petition to Governor Folsom did call upon the Board of Trustees to reconsider their decision. The blaze of publicity seemingly stiffened the administration's attitude in defense of the action of the Board. The publicity also resulted in several threats, by long-distance telephone, of violence to Professor Hutchinson, which caused him to request police protection from campus and city officials. No attempts to harm Professor Hutchinson were actually made, however.

A group of the faculty presented a petition to President Draughon which began, "We, the undersigned members of the Faculty of Alabama Polytechnic Institute, wish to express our deep concern in the issue of academic freedom and faculty responsibility which has been raised by the terms of the dismissal of Mr. Bud R. Hutchinson." The petition stated that its signers, in addressing the President at this time, were not primarily concerned with Hutchinson's status or his views on racial integration, but with informing the President of the faculty's concern for its "academic position" and "professional effectiveness," which "have been seriously shaken by the implicit declaration in this case that a difference of opinion on an issue of current general interest is viewed by the Board of Trustees and by the Administration as proper ground for dismissal." The petition stated that its signers recognized "the delicacy of the present situation," but they wanted their concern for academic freedom to be known to the President and the Board, and they expressed

the hope that the existence of academic freedom at Alabama Polytechnic Institute "may be recognized and respected." The petition urged the President to "take the earliest opportunity to publicly reassure the Faculty on this question which affects us all as teachers, scholars, and individuals."

Officers of the Auburn chapter of the American Association of University Professors had been in touch with the Washington Office of the Association by long-distance telephone since May 15, and upon the advice of the Washington Office, the chapter officers decided to leave the Hutchinson case and its unfortunate segregation implications to be investigated by Committee A of the Association, while the faculty at Auburn pursued the broad issue of academic freedom. This advice offered to the chapter officers was in accordance with the Association's traditional policy in such situations.

Before the faculty petition reached President Draughon, an informal committee of eight faculty members held a conference with the President, the Vice-President, and the Dean of Faculties, seeking clarification of conflicting stories about the dismissal action. At this conference, which took place on May 16, the group agreed that the President would attempt to arrange a meeting between representatives of the faculty and the Board to discuss the general question of academic freedom at Auburn. At its June 3 meeting, the Board of Trustees authorized three of its members to meet with seven representatives of the faculty, including Professor Brittin, the elected Chairman of the General Faculty, and six others appointed by him. The Board members of this committee were Messrs. Samford, Haley, and Collier; the faculty members were Professors Malone, Sprague, Smith, Ward, Ivey, Tendy, and Brittin. When the joint faculty-trustee committee assembled, on June 25, the faculty representatives insisted, in view of the uncertainties regarding academic freedom at Alabama Polytechnic Institute, that the Board "ought either to reaffirm its adherence to the principles of academic freedom or else indicate precisely what restrictions are to apply in the future" to the faculty. The joint committee agreed in principle upon a statement of policy on academic freedom and tenure and on revision of the contract form. After the meeting, President Draughon prepared drafts for submission to all members of the committee. Changes proposed by both trustee and faculty members were accepted by the committee. On August 23, the full Board adopted the committee's proposals.

The "Statement of the Policy of the Board of Trustees on Academic Freedom, Tenure, and Responsibility" asserts that the Board "is charged with the responsibility of the management and control" of the Institute under the Alabama Constitution and Code of 1940, and it "cannot waive these duties and responsibilities to the people of Alabama for the continuation, growth, and services of the Institute." The "performance

of these legal obligations" requires the Board to "take such action as it shall deem necessary to protect the institution and its employees from the storms of public controversy which arise from time to time in order that the institution shall be free to discharge its responsibilities in teaching, research, and extension teaching." The Board recognizes, however, that such educational purposes can be achieved "only in a climate in which its employees enjoy the traditional exercise of academic freedom prevailing in American universities and colleges." Accordingly, the Board endorses "the scholarly goals of the Faculty," including "the advancement of knowledge through the search for, and the freedom to teach, the truth." In particular, the Board "subscribes in general to the 1940 Statement of Principles of the American Association of University Professors" and to the "Standards of the Southern Association of Colleges and Secondary Schools as they apply to academic freedom, tenure, and responsibility."

In view of the above "Statement of Policy," the Board revised the contract form for employees ("Notice and Acceptance of Appointment"), reserving the "right to revise, alter, or abrogate such form when the interests of the institution or the public shall so require." Paragraph 5 of the revised contract form refers to the Board's "power, which it cannot waive, to remove any employee when the interests of the Alabama Polytechnic Institute or the public require such action," but declares that, in the exercise of this power, the Board "subscribes in general to principles of academic freedom and responsibility prevailing in American universities and colleges." Paragraph 6 indicates procedure for removal of professors having tenure. This includes a written statement of the reasons for removal and opportunity for a hearing of record "composed and conducted as the Board shall determine," with the right to introduce witnesses and testimony as evidence. Paragraph 7 asserts that "Members of the faculty not enjoying tenure who receive notice of removal for cause shall have the right to appeal to the Board for a hearing, which the Board may grant in its discretion."

When the new "Statement of Policy" was announced, it was greeted by an editorial in the *Montgomery Advertiser,* entitled "Academic Freedom at Auburn Restricted Formally." The main evidence for the *Advertiser's* position was the sentence referring to the "storms of public controversy," which the *Advertiser* interpreted as a rule that "professors must either believe in segregated schools, or keep their mouths shut, or get out." In reply, the *Auburn Alumni News* for September, 1957, asserted in its headline that "API Trustees Support Principles of Academic Freedom for Auburn," and criticized the *Advertiser's* handling of the Associated Press news story. Another report on the new "Statement of Policy" and revised contract form appeared in *This is Auburn,* October, 1957, under the title "Academic Freedom Statement is Given."

The committee queried members of the Board of Trustees and administration at great length about the portions of the "Statement of Policy" and new contract form which refer to "storms of controversy," and the Board's subscription "in general" to the 1940 Statement of Principles. Most answers began with reference to the riots at the University of Alabama, which are thought to have seriously damaged that institution. The committee was told that the inhibition of "storms of controversy" meant real storms and not differences of opinion. Reference was always back to the existing tensions, attitudes of the legislature, and appropriations. This policy, however, cut both ways, and the Board was as anxious to discourage professors from being embroiled on the side of the segregationists as on the side of the integrationists. Possibly a *Plainsman* editorial, "Free Speech *vs.* Money," reflects the basic rationale: The Board is in favor of as much free speech as the financial security of the institution will permit; so it believes that the segregation debate should not involve the Institute.

In response to questions about the Board's subscription "in general" to the 1940 Statement of Principles, the committee was repeatedly told by members of the Board and administration that this was only an effort to give the Board leeway to resolve any conflicts between the 1940 Statement and the Southern Association standards, and not a reservation or "escape" from the 1940 Statement in any particular. One member of the Board further explained that it was also an effort to avoid the illegal delegation of Board authority and the automatic incorporation of future action of the American Association of University Professors into the Board's "Statement of Policy."

In the course of the investigating committee's interviews with a small percentage of the faculty, the opinion was expressed that the administration of Alabama Polytechnic Institute had a generally good record on academic freedom in the past. Several faculty members expressed the belief that the clarification of the Board's attitude following the Hutchinson case, and the preparation of a new statement of policy and a new contract form, made academic freedom at Auburn more secure in the future. Several members of the social science faculty stated that they felt free to discuss racial problems in their classes and to present both sides. The faculty members who participated in the discussions following Hutchinson's dismissal agree that there has been no administrative discrimination against them in salaries or otherwise.

Several faculty members expressed the opinion that a letter similar to Hutchinson's could be written today with impunity, in the light of the Board's new understanding of academic freedom. However, the soundness of this opinion is brought into question by the following passages in a communication received in the Association's Washington Office on February 1, 1958, entitled "Statement of the Special Committee of the

Board of Trustees and Officers of Administration, Alabama Polytechnic Institute, on the Committee Draft for Report on Hutchinson Case":

The Board of Trustees considered that Mr. Hutchinson failed to exercise appropriate restraint or show respect for opinions of others, greatly to the detriment of the institution. The action of the Board was based on this conclusion. In the entire history of the Alabama Polytechnic Institute the Board of Trustees has never moved to curb academic freedom. The Board did not feel that it was departing from this traditional policy in its action in this case.

* * *

[W]hen the Board went into executive session it knew the position of the American Association of University Professors relative to academic freedom, considered it had every right in requesting, because of his lack of appropriate restraint and ill-advised public statements on a controversial issue, that Mr. Hutchinson's contract not be renewed. After careful examination of the published statements on academic freedom—freedom in research, freedom in the classroom, and lack of freedom to speak without restraint—members of the special committee of the Board are of the opinion that one of these three statements should be as effective as another, and that decision as to whether a faculty member exercises appropriate restraint and shows respect for the opinions of others is a matter for decision of the Board.

* * *

Your committee report . . . states that "Professor Hutchinson's action in writing a letter to the student editor of the campus newspaper was also a valid exercise of his freedom to teach." There follows a legalistic play upon terms and definitions in an effort to prove this point. The Board of Trustees will defend any member of the faculty in his right of freedom in the classroom. It cannot relate this freedom to public utterance in the campus paper, however, and protests this conclusion of your committee.

* * *

The Alabama Polytechnic Institute discharged its responsibilities to Mr. Hutchinson fully, and does not agree that in doing so it in any way restricted his academic freedom or his tenure.

V

On the basis of its investigation of the facts and its understanding of the 1940 Statement of Principles, the committee has arrived at the following interpretations and conclusions:

A. In making its decision to deny reappointment to Professor Hutchinson, the Board mistakenly considered only the question of tenure. Professor Hutchinson did not have tenure, but he was entitled to academic freedom as a teacher and as a citizen. The 1940 Statement of Principles asserts: "During the probationary period a teacher should have the academic freedom that all other members of the faculty have."

B. Refusal to reappoint a teacher because of an unpopular expression of views on segregation does involve a question of academic freedom. This action of the Board may have been due to a failure to see the issues rather than to a willful and deliberate violation of the freedom of the faculty. If the Board had acted upon consultation with the administration and faculty instead of by hasty vote in executive session, this error might have been called to its attention at once.

C. Professor Hutchinson's action in writing a letter to the editor was a valid exercise of his freedom to express his views as a citizen, and did not involve a breach of the canons of appropriate restraint, respect for the opinions of others, and duty to dissociate one's view from that of the institution.

The Board members interviewed took the position that even if Professor Hutchinson was entitled to academic freedom, his letter violated all three of these canons. The investigating committee believes that this justification was arrived at long after the March "executive session" in an effort to reconcile the action of the Board with a subsequent clearer understanding of the 1940 Statement of Principles on Academic Freedom and Tenure. The committee does not believe, however, that the facts support the attempted justification.

(1) It is true that Professor Hutchinson did not expressly dissociate himself as an institutional spokesman, and did add rank and department to his signature. But his letter appeared in a "letters to the editor" column and could hardly be understood as representing anything but an individual point of view. Furthermore, it was published in the campus newspaper, not a paper of general circulation, making it even less likely that there would be any misunderstanding. Against this background, the rank and department seem more useful to identify him than to mislead his readers into the belief that he was an institutional spokesman.

(2) Professor Hutchinson's letter, moreover, does not seem to involve a violation of the canons of appropriate restraint and proper respect for the opinions of others. Some of the language used—the Trustees especially noted the concluding sentence—was more emotional than intellectual, more exhortation than communication of knowledge and research. But academic freedom does not exist to protect only dry detailing of facts, and professors must have leeway to speak with vigor and conviction. In Professor Hutchinson's letter, the twenty-two lines expressing conviction appear as the upshot of one hundred and forty lines dryly analyzing a complicated social issue.

To be sure, the question of what restraint is "appropriate" cannot be settled in a vacuum. Discussion of the issue of school segregation is

charged with even more serious perils of attack on universities in the South than was the issue of national security elsewhere between 1950 and 1955. There are serious tensions in Alabama, and the situation, especially since the Autherine Lucy case at the University of Alabama, is charged with emotion. The question of "appropriateness" in the restraint of language must, of course, be related to the actual situation. But the lack of any serious threats to good order or the welfare of the Alabama Polytechnic Institute in the period between February 20, when the letter was published, and May 15, when the Board's action became known, would seem to indicate that the Board's judgment of danger from Professor Hutchinson's letter was simply unsound. There is no tangible evidence that the publication of the letter damaged the Institute, although several members of the Board, meeting two weeks after the letter was published, apparently believed that it was potentially dangerous. Threats against Professor Hutchinson were made in May, after the Board's action was made public, not in February. Moreover, it must be recognized that academic freedom cannot be measured or limited by vague threats to the welfare of an institution or a community which may or may not result from what a professor says or does. If a professor must hold his tongue lest he cause an alumnus to withhold a gift, a legislator to vote against an appropriation, a student not to register, or a citizen's feelings to be ruffled, he will be free to talk only to himself.

D. Professor Hutchinson's action in writing a letter to the student editor of the campus newspaper was also a valid exercise of his freedom to teach. "Freedom in the classroom" to discuss the teacher's "subject" is only one aspect of the freedom to teach. The very nature of a college or university justifies faculty members in making use of appropriate opportunities to teach the institution's students outside the classroom. In these situations, the word "subject" cannot be narrowly construed. Professor Hutchinson's letter was addressed to a matter about which any alert social scientist might reasonably be expected to be concerned. Although Professor Hutchinson's field of special competence is economics rather than sociology or public school administration, the factual accuracy and cogency of a discussion of a report on integration are not the exclusive responsibility of teachers of logic and composition. They are also, and particularly, the responsibility of any teacher who is trying to educate his students in scientific habits of thought concerning social phenomena.

E. The action of the Board, in stating its Freedom and Tenure Principles in writing and redrafting its notice of appointment after detailed consultation with the faculty and administration, is commendable and encouraging. The new notice of appointment, it should be observed,

has several provisions designed to safeguard academic freedom and provide for procedural due process in removal cases—provisions which were conspicuously absent from the old contract form. The committee has indicated its concern with the reservations in these documents in regard to "storms of public controversy" and agreement with the 1940 Statement of Principles "in general."

The committee would suggest that there are still several shortcomings in the new Statement of Policy:

1. Although a hearing is provided in cases of dismissal for cause of faculty members on tenure, the hearing is to be "composed and conducted as the Board shall determine." Good practice calls for some provision for consideration "by both a faculty committee and the governing board of the institution." This could be done by a Board rule.

2. A hearing is allowed in dismissal cases involving nontenure professors only at the discretion of the Board. The 1940 Statement requires a hearing in a case of "dismissal for cause of a teacher previous to the expiration of a term appointment."

3. The Statement reiterates too frequently the obvious fact that the Board has the legal power under the Alabama Statutes to dismiss the entire faculty at will. A statement of policy indicating that a Board intends to follow acceptable standards of academic freedom in exercising its legal power need not be qualified with constant references to its legal rights and duties and legal inability to waive its responsibilities to the public or to its benefactors.

4. The Statement of Policy refers to the 1940 Statement of Principles "of the American Association of University Professors." The 1940 Statement is actually the joint statement of the American Association of University Professors and the Association of American Colleges, and has been endorsed by a number of other educational organizations. It represents the concern of college administrators, as well as college professors, with academic freedom and tenure. Similarly, it would seem appropriate for the Board of Trustees to recognize that Alabama Polytechnic Institute as a whole (Board, Administration, and faculty) is dedicated to the advancement of knowledge through the search for, and the freedom to teach, the truth, rather than to endorse it as one of the "scholarly goals of the Faculty."

PAUL OBERST (Law), University of Kentucky, *Chairman*
LOYD D. EASTON (Philosophy), Ohio Wesleyan University

Texas Technological College

Texas Technological College is a state-supported institution, with an enrollment of more than 8500 students, situated at Lubbock, in the south plains area of western Texas. It is governed by a board of nine Directors appointed by the Governor of the state, with the approval of the state Senate, for overlapping terms of six years.

On July 13, 1957, the Board of Directors met in Lubbock for the purpose of discussing and approving matters related to the college budget for the ensuing academic year. All Board members were present except Chairman Winfield D. Watkins and Mr. Parham C. Callaway. On two occasions during the day-long meeting, the Board went into executive session, excluding the President of the College, Dr. E. N. Jones, and all who were not Board members. At the close of the second executive session, President Jones was called to the meeting and informed by Vice-Chairman James L. Lindsey that the Board had voted unanimously not to approve the recommended 1957–58 contracts for two faculty members, Byron R. Abernethy, Professor of Government, and Herbert M. Greenberg, Assistant Professor of Psychology and Associate Director of the Vocational Rehabilitation Counseling Program. The President was told that the Board had voted also to discontinue the Adult Education Program and had declined to renew the contract of its head, Per G. Stensland, Professor of Education. These actions of the Board are the subject of this report.

A press release by President Jones on July 15 began as follows:

I made a vigorous protest to the Board of Directors Saturday afternoon, July 13, after being informed of the actions affecting Dr. Byron Abernethy, Dr. Herbert Greenberg, and the Adult Education Program and with it, Dr. Per G. Stensland. I protested the manner in which these actions had been taken. They were done in executive session. Since the abolishment of the Adult Education Program was also accomplished in executive session, I was not privileged to present reasons and viewpoints for its continuance to the entire Board.

It has become accepted procedure that at the request of a single member, the Board must go into executive session.

Professors Abernethy and Greenberg were first informed of the Board's action by newspaper reporters on the evening of July 13, Professor Stensland being out of town on that date. Subsequent to this action, all three professors discussed the dismissals with President Jones, but

formal notifications of non-renewal of their contracts were not given to the three professors, and, as of the date of this report, no formal or informal statements of charges against them have been made.

The reaction of the faculty of Texas Technological College was immediate. The Faculty Advisory Committee, an official and representative body of fourteen members established for liaison between the faculty and the administration, met in special session on July 15 and prepared a statement which deplored "the secrecy surrounding the decision of the Board denying certain faculty members renewal of contracts," and pointed out that the Board's action against the professors (1) was apparently in violation of the tenure policies of the College, (2) constituted "a denial of basic American principles of justice," and (3) had "brought discredit upon Texas Tech." The statement concluded with the announcement of a called meeting of the faculty for the following day, July 16, to "discuss this action of the Board, and to initiate such action" as might seem appropriate to the faculty.

Approximately the entire faculty in residence during the summer session, about three hundred in number, attended the called meeting. After discussion, the meeting adopted the following resolution unanimously:

WHEREAS the action of the Texas Technological College Board of Directors, which met in secret executive session Saturday, July 13, 1957, in refusing to renew the contracts of two members of the Tech Staff without giving reasons and without a hearing, is manifestly unjust; and

WHEREAS such action—dismissal without charges and without a hearing—tends to discourage freedom of thought and to create in the mind of every member of the Staff a feeling of insecurity, which will destroy faculty morale, without which there can be little effective teaching or research; and

WHEREAS such action, having destroyed the morale of the faculty, will cause deep dissatisfaction in the student body, and thus make it increasingly difficult for the College to perform its normal function; and

WHEREAS such action is further harmful to the College in that it will result in the loss of respect of other educational institutions throughout the United States, and, consequently make it more difficult to recruit and to retain competent faculty members; and

WHEREAS such action could affect the College's accreditation; and

WHEREAS it is the belief of the faculty that if these facts are called to the attention of the Tech Board of Directors, it will wish to reconsider its action at the earliest possible moment in an open meeting: Therefore be it

RESOLVED, That the Tech Faculty ask President E. N. Jones to convey these sentiments to the Board of Directors with the urgent request that an open meeting be called as soon as possible; and be it further

RESOLVED, That a copy of this resolution be submitted by the Chairman of the Faculty Advisory Committee to President Jones with the

further request that he send a copy to each member of the Board of Directors.

President Jones addressed the faculty meeting and referred again to the possibility of changing the bylaw with respect to the calling of executive sessions of the Board. He also said, "I feel that Dr. Abernethy and Dr. Greenberg should be accorded a hearing by the Texas Tech Board of Directors. The granting of such a hearing would, as I see it, be in keeping with their professional and constitutional rights." The President had conferred by telephone with seven of the Directors prior to the faculty meeting and had, as he said, "good reason to believe" that a special session of the Board might be called soon.

On July 16, the head of the Department of Government, Professor J. William Davis, released a letter he had written to Vice-Chairman Lindsey, requesting a hearing for the dismissed men at an early date. In a reply to Professor Davis, the Vice-Chairman stated that the request "will be consummated pending the return of Watkins . . . and the availability of Board membership." On July 23, Chairman Watkins returned to Texas from his vacation and, after conversations with Board members, concluded that it was doubtful that the Board would grant a hearing before the next regular meeting on August 17. At a conference on July 26, President Jones and Chairman Watkins agreed to recommend the establishment of a committee to study the problem of tenure at the College, the committee to be composed of two Board members, two members of the College administration, and two representatives from the Faculty Advisory Committee. Appointment of an investigating committee was approved on July 27 by a group composed of Chairman Watkins, President Jones, Vice-President G. E. Giesecke, and the members of the Faculty Advisory Committee, six in number, who were in residence at the time. This group also agreed that the proposed investigating committee should conduct a hearing for the dismissed faculty members and attempt to work out a satisfactory solution. Later in the day, Mr. Watkins canvassed the Board members and learned that most of them were opposed to the group's proposal for the establishment of the investigating committee. Mr. Watkins issued a statement, parts of which are as follows:

After careful study and due deliberation and approval of the Board, I wish to make the following statement, as promised:

The Board's unanimous and carefully deliberative action in refusing to renew the contracts of the professors in question was carried out in compliance with its legal obligation to the citizens of Texas, assumed under oath of office, with the firm conviction that it was for the best interest of Texas Tech.

Inasmuch as no one's constitutional rights have been violated in any

way and since the Board has not received any additional information which would cause them to change their prior unanimous action, we therefore consider the incident closed.

President Jones' reaction to the Watkins statement was reported as follows in the local press:

> The surprise announcement brought swift reaction from President E. N. Jones, Tech president, who evidenced "grave concern" over the possibility the college would lose its accreditation as a result of the action.
>
> "I reiterate that dismissal from a college faculty should be with due process," the President said.
>
> He added that, despite Watkins' statement on behalf of the Board, he still had slim hopes that the professors will be heard.
>
> "I have hopes in the sense that I think it is within their professional and constitutional rights."

President Jones recommended to at least one of the dismissed professors that he request a hearing before the Board, and subsequently all three made such requests. On August 13, President Jones obtained Chairman Watkins' consent to arrange informal conferences with the three professors. These conferences, which were held in Lubbock on August 14, were considered by the administrative officers and the two Board members as acts of personal courtesy rather than as official procedures. Each meeting with the professors lasted about an hour, and those in attendance, besides the dismissed faculty members, were Chairman Watkins, Vice-Chairman Lindsey, President Jones, Vice-President Giesecke, and Professor J. William Davis, the head of Professor Abernethy's department.

At each conference, Chairman Watkins explained that the meeting was not to be considered as a hearing, but rather as an opportunity to inform each professor of what the two Board members considered were the reasons for the Board's action against him. Professor Abernethy states that at his interview Chairman Watkins read parts of three letters written by citizens of Lubbock who approved of the Board's decisions. Two of these letters were by former students, one complaining of Professor Abernethy's "classroom attitude," and the other referring to some kind of "feeling" on the campus about Professor Abernethy which had caused the writer to avoid a class under him. The third expressed the view that Professor Abernethy had embarrassed the College by making himself a "highly controversial figure." Chairman Watkins remarked that these were typical of ten letters in his file which had been written at his request after the dismissals. There was also mention of a "file" on Professor Abernethy, kept by a Board member over a period of two years, which included the information that the former's federal income tax returns for the years 1950 to 1953 disclosed that his outside earnings

for those years exceeded his college salary. Chairman Watkins stated that the Board considered that the facts concerning the outside income indicated a greater interest on the part of Professor Abernethy outside the College than in it. In answer to specific questions from Professor Abernethy, Chairman Watkins denied that political activity of the former had anything to do with his dismissal, although he did state that Professor Abernethy's political activities had been discussed at the June meeting of the Board, and that he (Watkins) had been instructed to, and did, advise President Jones to warn Professor Abernethy to "slow up" on his political activity. (Professor Abernethy's action in behalf of the "liberal" wing of the Democratic party in Texas will be discussed below.) Professor Abernethy states that in reply to a direct question concerning his classroom instruction, Chairman Watkins said, "I don't think his teaching ability is really the reason." Concerning the clarification of the charges against him during this conference, Professor Abernethy states, "Thus, at the close of this conference, I remained about as much in the dark as I had been before it occurred, as to the real reasons for my discharge."

Professor Greenberg reports that his conference began with Chairman Watkins' statement that this was not a hearing, that the conference was not approved by the Board, that the Chairman merely wanted to tell "you what we've got," and that he would not discuss the methods employed in effecting the dismissals. There was reference to letters received by Chairman Watkins subsequent to the Board's action, and to files kept by one or more Board members. Professor Greenberg writes, "I am prepared to swear under oath that at no time during the meeting was I given one single charge against me, made by the Board prior to July 13th. I walked out of the meeting as completely in the dark as to the reasons for my firing as I was when the meeting began."

A press report quoted Professor Greenberg as having stated, in an interview, that one of the items referred to by Mr. Watkins was a petition by twelve students, critical of Greenberg's teaching, which reached Mr. Watkins some time after the Board's decision of July 13. This petition had also been mentioned in an earlier newspaper article, together with a counter petition, favorable to Professor Greenberg, signed by twenty-five students.

In his conference with Mr. Watkins, Professor Stensland was told that the Board terminated the Adult Education Program, together with his position as head, for reasons of economy. When Professor Stensland pointed out that one of his associates in the Program had been continued on the faculty, whereas no faculty position was being found for him, Mr. Watkins is quoted as replying, "The Board did not consider the question of another position for you."

Two Board members stated later that Professors Abernethy and Greenberg were offered the opportunity of having the press at their interviews, and that this offer was declined. The Board members were apparently implying, by their references to the absence of the press, that a public hearing was thereby declined by the two professors. Professors Abernethy and Greenberg place a different interpretation upon this incident. At some stage during their conferences, both were offered the opportunity of having the press present, but both considered that since they had not initiated the conferences, and since Chairman Watkins had stated that the meetings were not to be formal hearings, the presence of the press was a matter for the Board members to decide.

During their conferences, the three professors repeated their requests for hearings at the coming meeting of the Board on August 17. In a prepared statement for the press, released after the conferences, Chairman Watkins said that the final decision on hearings for the professors would rest with the Board of Directors, and that since the conferences were held "on a personal basis," the two Board members and the administrators who participated in them did not represent the Board.

After interviews with the two Board members following the conferences, the local press reported:

> The pair brought with them what Lindsey later termed "an armful of letters and other documents" from Texas Tech students, alumni, and even present faculty members.
>
> Watkins explained that he "carried all the information I had."
>
> He added: "The letters were mostly from citizens of Lubbock and all in favor of the action of the Board. Let me amend that. I also had some letters not in favor. I carried with me all the information I had in case I needed it."
>
> He explained that he had solicited letters from various persons after hearing that "so-and-so said such-and-such." Most of the letters have been written since the Board took its action, he confirmed.

With respect to the writers of the letters, Mr. Watkins was quoted as saying, "They wrote the letters and weren't afraid to sign their names." Professor Abernethy, however, reported that Mr. Watkins refused to identify the author of any letter.

The account of the conferences which President Jones gave to the investigating committee agrees substantially with the description given above, with the exception of certain inferences which have been drawn.

At its regular meeting on August 17, which was open to the public, the Board took immediate action to change its bylaws to require a majority vote for the holding of an executive session. Chairman Watkins requested that the Board authorize him to appoint a special committee to prepare statements on tenure and on participation in outside

activities by faculty and staff; he suggested that the committee be composed of two Board members, two faculty members, and two members of the Administration. After these suggestions were incorporated into an official motion, Director J. Evetts Haley offered the following substitute motion:

1. In view of the public need of determining whether the State of Texas wants these alleged "professional rights" of professors legally confirmed as the "special privileges" they actually are, and whether incompetence and indiscretion generally can continue to enjoy immunity from accountability under the unctuous and dishonest cloak of "academic freedom," we urge the Legislature to define, by law, whether or not any college employee has a vested right in a job, and hence whether or not anyone can be fired for any just cause without danger of turning the institutions of Texas, willy-nilly, into public sounding boards for radical elements everywhere.

2. Because of the widespread impugning of the motives and integrity of certain members of the Board, and especially for the maintenance of public confidence in Texas Tech and the clarification of confused educational policies generally, we respectfully suggest this field of inquiry by the Representatives of the State of Texas.

And, Resolved, finally that we pledge the tax-paying parents of Texas, that this Board of Directors, duly appointed and confirmed, will continue to run this school in keeping with the clear mandate of the law and our oaths thereunder, to the best of our abilities, for the true moral and educational benefit of the young men and women of this sovereign state, irrespective of the left-wing clamor, innuendo and agitation.

The substitute motion failed for want of a second, and the original motion passed, with Director Haley voting "no."

Professor Greenberg's letter requesting presentation of formal charges and a hearing upon them was read; after a brief discussion, the request was denied with one dissenting vote. In explaining his dissent, Director Haley said that he did not think it was in the best interest of the College to deny the request for a hearing. The request of Professor Abernethy for a hearing was also denied. The Board was informed that The Fund for Adult Education, grants from which had been the major support of the Adult Education Program of Texas Technological College, had offered an additional grant of $1000 a month for four months to enable Professor Stensland to prepare a report on the Program; this offer was accepted by the Board. No action was taken with respect to Professor Stensland's request that he be restored to his position as Professor of Education.

Following the conferences of August 14, the press had reported Chairman Watkins as saying that reasons for the dismissals would be given at the open meeting of the Board on August 17, but this meeting adjourned without such reasons having been given. The press reported

that, in answer to reporters' questions about the failure to give reasons, Mr. Watkins first said that he had been misquoted previously; he was quoted as stating later that he had polled the Board, and they had decided not to give reasons. One article reported that the Board members met in a strategy session on the evening before the open Board meeting, and that the suggestion of Directors Watkins and Lindsey that reasons for the dismissals be announced on the following day was rejected at this informal session.

Following the Board meeting of August 17, President Jones issued a brief statement to the press: ". . . We of the faculty and staff must pick up our respective tasks and move ahead. The action of the Board in authorizing the appointment of a committee to study and to bring to the Board recommendations on tenure policy is a welcome and reassuring note."

II

Newspaper clippings on the dismissals, and several letters of protest, were received in the Central Office of the American Association of University Professors immediately after the Board's action of July 13. Professor Abernethy, on July 20, requested the Association to withhold any investigation until the Board might have an opportunity to reconsider its action free of outside intervention. Then, following Chairman Watkins' statement to the press, on July 27, that the Board members considered "the incident closed," he withdrew his objections and requested the Association to conduct an investigation. Subsequently, Professors Greenberg and Stensland made similar requests. The General Secretary of the Association responded with the promise that an investigating committee would be sent as soon as possible, and proceeded with the necessary preliminary correspondence, the assembling of basic facts, the appointment and briefing of a committee, and arrangements for the committee's visit.

The committee, composed of Ralph C. Barnhart, Professor of Law, University of Arkansas, and Joseph C. Pray, Professor of Government, University of Oklahoma, visited the campus of Texas Technological College on Friday, October 4, 1957. Preparatory to this visit, the Central Office of the Association had furnished the committee a considerable amount of material on the case. This material included copies of two reports by President Jones to officers of the Southern Association of Colleges and Secondary Schools, giving his summary of the Board's actions with respect to the dismissals and events subsequent thereto. While in Lubbock, the committee conferred with President Jones, Professors Abernethy and Stensland, the Faculty Advisory Committee, and

a number of members of the faculty, besides meeting with the local chapter of the American Association of University Professors. On October 5, President Jones and the investigating committee drove to Abilene for a conference with Mr. Watkins, Chairman of the Board. Professor Greenberg was not in Lubbock, having accepted a position at another institution.

The committee met with President Jones for an hour and a half, reviewed with him the events set forth in Part I of this report, and discussed the tenure policies of the College, with particular reference to the tenure status of the three dismissed teachers. President Jones cited the tenure provision published in the *Faculty Handbook* of the College, which reads as follows:

> Contracts for appointments which do not carry permanent tenure are marked "Temporary." Otherwise, appointments, though covered by a new contract issued yearly, are on a permanent basis. Neglect of duty, moral turpitude, and conduct which brings embarrassment upon fellow faculty members, upon the college, and upon the teaching profession may constitute grounds for contract severance. Failure to maintain a satisfactory credit rating, if prolonged, and if unpaid bills become a source of complaint by a number of places of business in Lubbock and elsewhere, may likewise constitute grounds for contract severance.

President Jones granted that the tenure provisions are unclear and that the administration had probably been remiss in not clarifying them earlier, but he added that the College had gone along for so many years without the slightest difficulty about tenure that the matter had not been pursued. The contracts issued to the three dismissed professors did not have "Temporary" written on them, and President Jones stated that it was his understanding that all three had tenure. Later, the committee determined that both Professor Greenberg and his department head understood that the continuance of the former's position was dependent upon a federal grant for vocational rehabilitation.

President Jones confirmed the fact that no question had been raised as to the professional competence of the three professors, and that they had all been recommended for salary increases by their immediate superiors. While he was reluctant to admit that they had been denied a hearing of any sort, he did not attempt to make more of the August 14 conferences than the facts justified. He reported that the budget committee of the Board had approved the entire College budget (including provisions for Professors Abernethy, Greenberg, and Stensland) on the evening before the July 13 meeting. This would seem to indicate that prior to the action taken in executive session the next day, at least the members of the budget committee did not contemplate the dismissal actions.

The conference with President Jones also confirmed that the College had no regulations, and that the Board had laid down no policy, which would guide the faculty in matters related to political activities. President Jones stated that the Board, if concerned about the activities of Professor Abernethy in this respect, had not made clear to President Jones that Professor Abernethy should be warned. According to President Jones, the Board now appears to think that he was expected to convey some cautionary word, and that he failed to do so. The investigating committee surmised, from such evidence as it was able to obtain, that if any directions were given to President Jones, they must have come after May 18, 1957, the date on which Professor Abernethy gave the keynote speech at the initial meeting, in Austin, of an organization known as "Democrats of Texas," a liberal faction of the Democratic Party in the State.[1] As noted above, Chairman Watkins confirmed the fact that Professor Abernethy's political activities had been discussed at the June meeting of the Board, but he mentioned no earlier discussion. Late in June, President Jones advised the head of the Department of Government that the recommended salary increase for Professor Abernethy might be reduced by the Board because of complaints which had reached certain members of the Board. Since there is no indication that Professor Abernethy engaged in political activity after May 18, or that the Board discussed his activity at any time before its June meeting, a disregard of warnings can scarcely be made the basis of the July 13 action.

Professor Byron R. Abernethy came to Texas Technological College as an instructor in 1941, and resigned in 1943 to enter government service with the National War Labor Board in Dallas, where he remained until 1946, attaining the rank of regional wage stabilization director. After serving in 1946–47 as associate professor of economics at Western Reserve University, he returned to Texas Technological College as associate professor of government in 1947. He was promoted to the rank of professor in 1949, and was granted a leave of absence from 1951 to 1953 to fill the position of regional director and chairman of the Regional Wage Stabilization Board in Dallas. After returning to Texas Technological College, he was granted sick leave from February, 1954 until the end of the summer term, 1955. During his service with the College he received regular salary increases, and his department head recommended that he receive a full increase for the year 1957–58 within the salary range for his rank.

In discussing Chairman Watkins' reference to his outside income, Professor Abernethy told the committee that much of his non-teaching

[1] Paul M. Butler, Chairman of the National Committee of the Democratic Party, stated recently that the intra-party strife in Texas is the sharpest to be found in any state in the Union.

income was for periods when he was on leave of absence, and included a government salary which was over twice that which he received from the College. With regard to the years for which the Board of Directors had gathered information concerning his income, 1950–53, Professor Abernethy stated that only in 1950 was he employed exclusively by Texas Technological College. He pointed out also that when he returned to Texas Technological College in 1947, the matter of his outside arbitration practice had been cleared with the then President, Dr. William Marvin Whyburn, and this clearance was later embodied in a letter from his department head, Professor Davis. In a conversation with the committee, Professor Davis confirmed the facts in relation to this clearance. Professor Abernethy stated that, in the light of his understanding with the College, he had been scrupulously careful to fulfill his obligation to his classes and to do his full share of work on faculty committees and as a member of the Graduate Council. Professor Davis confirmed Professor Abernethy's estimate that he had fulfilled his professorial responsibilities. He further stated that Professor Abernethy's work in the department showed ability of a "high order," and that he considered Professor Abernethy to be the strongest man in his department.

Professor Herbert Greenberg, who is blind, joined the faculty of Texas Technological College in September, 1955, under a five-year grant to the College by the United States Office of Vocational Rehabilitation. During the year 1956–57, he served as associate director of the vocational rehabilitation program of the College as well as assistant professor of psychology. His activity in his field is attested by six articles accepted for publication by scientific journals during the past year. One of these, "Attitudes of White and Negro High School Students in a West Texas Town Towards School Integration," in the *Journal of Applied Psychology* (February, 1957), was the result of a study conducted by Professor Greenberg and his students, and, at least partially, furnished the basis for newspaper speculation that his views on the race question accounted for his dismissal. His doctoral dissertation was on the effects of segregated education on the personalities of those experiencing it, and while this was in fact a study of the segregation of the sightless from the sighted, it was suggested to the investigating committee that the dissertation had been accepted in the vicinity of Lubbock as further evidence of his questionable attitudes on the subject of race relations. Professor Greenberg states that President Jones told him that the President had the impression that his dismissal resulted from speeches he had made in Chicago and in Louisiana. Professor Greenberg read a paper to the American Psychological Association, at a meeting in Chicago, which concerned the investigation of the attitudes of high-school students

referred to above. He informed the committee that he had never been in Louisiana. During his residence in Lubbock, he made many public appearances, sometimes speaking on topics related to prejudice, especially prejudice with reference to the problems of the blind.

Professor Sylvan J. Kaplan, head of the Department of Psychology, spoke of Professor Greenberg's intellectual brilliance and unusual capacity for work. The committee was given the impression that the latter's aggressive energy and perhaps some measure of tactlessness might have been annoying to some people and may account for dissatisfaction on the part of some students. Professor Kaplan insisted, however, that there was nothing in Professor Greenberg's record at Texas Technological College that merited dismissal and that the recommendations for renewal of his contract and for an increase in salary were fully justified.

Professor Stensland, a naturalized American citizen of Swedish descent, joined the faculty of Texas Technological College in 1952 as professor of education and head of the Adult Education Program. His participation in such professional activities as adult education workshops, institutes, and conferences has been extensive and varied. President Jones informed the committee that the Adult Education Program at Texas Technological College, under Professor Stensland's direction, had come to be recognized as one of the best of its kind in the country. President Jones said that the abrupt termination of a program of such value to the state and to the College was most ill advised, and he expressed himself with some feeling in deploring the fact that the program had been ended by the Board without giving him or anyone else a chance to present a case for it.

While, as noted above, economy was given as the Board's reason for cutting off the program, and this reason has been adhered to fairly consistently, Director Haley was quoted in a press interview as follows:

> It was the further view of the Board that the so-called adult education program as formerly sponsored by the Ford Foundation was of little academic importance, considering the need for money in other vital and well-established fields. Hence, the adult education program, largely suspect of genuine academic value by many patrons of Texas Tech and by the most distinguished segments of the faculty, should be discontinued. Personally, I've always viewed it as a bit of plush academic boondoggling that any institution genuinely dedicated to the great academic traditions, and the really consecrated teachers who pursue it, can ill afford. In keeping with its duties established by law, the Board decided to terminate it permanently.

Persons with whom the committee talked treated with skepticism the claim of economy, pointing out that only about one-third of one per cent

of the total College budget was involved, and that the money taken from the Adult Education Program was simply transferred to the general account and not to some other pressing need. Neither is the claim of economy consistent with the fact that the next ranking person on the staff of the Program, who had the title of Executive Assistant, was not affected in the same manner as Professor Stensland, but is still retained on the faculty.

As noted above, the Board approved the acceptance of an additional grant of $4000 from the Fund for Adult Education to enable Professor Stensland to prepare a report on the five years of the Program. Professor Stensland recalls that when President Jones, with Vice-President Giesecke present, extended this offer to him on August 30, both the President and the Vice-President made it clear that "things might quiet down during those [four] months," and while there was no guarantee of a regular contract, the situation might be different later. It was suggested that the evaluation in the report should be cautious, and should not include a reference to the termination of the Program. On August 31, Professor Stensland refused the offer, on the ground that the evaluation work requiring four months would be a conditional research position and would partake of the nature of probation, during which time he would not know the grounds on which he was being tested. It should be noted that Professor Stensland had tenure, and that over a period of four and a half years he had taught six hours of advanced courses regularly each semester, substantially one-half of a teaching load.

During the academic year 1956–57, Professor Stensland had been approached by the head of the Department of Psychology regarding a position as Director of Counseling and Guidance. This proposal was renewed after July 13 and again after August 17, 1957, and it was laid before President Jones for his approval and recommendation to the Board. Meanwhile, Board member Lindsey had been quoted in an Associated Press report as referring to the three dismissed professors as "controversial," and as saying that "subsequent events have magnified rather than diminished this controversial status." Professor Stensland sent Director Lindsey "An Open Letter," with copies to the newspaper for which Mr. Lindsey serves as managing editor, and to the Lubbock *Avalanche-Journal,* both of which published it. The letter began: "Since when were Americans afraid of controversy, Mr. Lindsey? This country was built on the supposition that men find truth when evidence is open to scrutiny," and the author supported his theme with quotations from Locke, Jefferson, Brandeis, Holmes, Madison, and DeWitt Clinton. The letter charged the Board with violating this American tradition when it took its action in closed session. President Jones prepared a proposal

for presentation to the Board, suggesting that Dr. Stensland be given a one-year appointment as Director of Counseling and Guidance. After making some preliminary contacts concerning the probable reaction of the Board, the President decided not to present the proposal formally because of certainty that it would be rejected by the Board. Later, President Jones informed Professor Stensland that "this alternative to dismissal was turned down and the door is closed to further employment by the College." It was made clear that the door had been closed by the publication of Professor Stensland's letter.

As previously noted, the investigating committee conferred, on October 5, with Mr. Watkins, Chairman of the Board. Dr. Jones did not attend the conference. Since Mr. Watkins was absent from the July 13 meeting, he was in a position to disclaim personal responsibility for the manner in which the dismissals had been handled, although he stated that he had been fully informed as to what took place at the meeting. He told the committee that the dismissals were fully justified, but the "procedure was bad." He did not state any specific charges against any of the professors or give any specific reasons for the action. He mentioned letters he had received about Professor Abernethy, all written after July 13, but he did not show the committee any letters. He mentioned the views of Professor Abernethy as the basis of some of the unfavorable comment in the letters. He said that Director C. I. Wall, President of the Pioneer Natural Gas Company, would not permit Professor Abernethy to arbitrate disputes for Wall's company. He said that Professor Greenberg was not the kind of person anyone would want on a college faculty, but he mentioned only the student petition against him as evidence supporting this opinion. Concerning the action which affected Professor Stensland, Chairman Watkins said that the reason was economy and nothing else. He also pointed out that he had attempted to obtain the consent of the other Board members for a Board-Administration-Faculty committee to hold hearings, but the Board had rejected his proposal.

Chairman Watkins observed that because of the filling of a vacancy, and three recent regular appointments, a majority of the Board were new, that none had had previous experience in such a position, and that some of them actually did not, prior to July 13, know of the existence of such an organization as the Southern Association of Colleges and Secondary Schools, by which Texas Technological College is accredited. It seems fair to state, therefore, that because of their relative inexperience in administration of higher education, some Board members were not accustomed to examining such concepts as academic freedom and the proper relationship of a board of control to an administration and a faculty.

The investigating committee pointed out to Chairman Watkins that, on the basis of all the facts at hand, including those presented by him, the committee would have to report to the Association that the dismissals were arbitrary, that there was no pretense of a hearing, and that no satisfactory reasons had been given. He did not disagree. The committee referred to Mr. Watkins' own statement, as quoted in the newspaper that morning (October 5), to the effect that he had evidence supporting the Board's dismissal of the professors but would not make it public because "it would splash Texas Tech across the front pages some more and hurt the College"; the committee explained to him that this statement would do the men great harm by charging them in effect with wrongdoing without giving them a chance to defend themselves. He did not deny that this was so. The committee pointed out that the dismissals had been made without notice, just prior to the beginning of the academic year, and though the Board meeting was secret, the news was made public, with the result that two of the professors were first informed of their dismissals by newspaper reporters. Even worse, the news was received at night, in one case while the professor concerned was at a social function. Mr. Watkins' only comment was, "Terrible!" The committee indicated the inconsistency between the claim of economy in the case of the Adult Education Program and the retention of one member of the staff on the faculty. Mr. Watkins did not dispute the inconsistency.

The committee cited the belief of some members of the faculty that these were but the beginning of a series of dismissals, that files were kept on other faculty members, and that after the excitement over the recent dismissals had passed, others were sure to follow. Mr. Watkins was emphatic in stating that these fears are groundless. He did say, however, that the Board had heard criticism concerning some of the outside activities of another faculty member.

The conference with Chairman Watkins did nothing to dispel a strong belief which had been given wide publicity in Texas newspapers, and which was voiced to the investigating committee by many faculty members, that the three men were dismissed because of their social, economic, or political views, which differed sharply from those held by some of the Board members. Chairman Watkins' statement to the investigating committee further corroborated the committee's judgment that the members of the Board of Directors who met in executive session on July 13 neither understood nor recognized any obligations or principles of tenure with respect to faculty members. Due process was totally lacking, and the tenor of the proceedings of the Board seems wholly inconsistent with the principles of academic freedom.

III

The action of the Board had come as a shocking surprise to the faculty. They had accepted the tenure regulation, quoted above, as it was written, and those who met its requirements had felt secure. Faculty members, at the time of the committee's visit, appeared to feel little security in their positions, and many of them wondered if even the clearest of tenure regulations would protect an individual faculty member against arbitrary action if he should incur the displeasure of the Board. Some faculty members were frankly critical of President Jones, believing that while he took a strong position in defense of the rights of professors at first, he gave up too quickly, or else changed sides. No faculty member interviewed by the committee knew of any legitimate reason for the dismissals. Some interpreted the action as the beginning of "thought control" on the campus. Colleagues of the dismissed professors all testified to their competence and scholarship. Dean R. C. Goodwin, of the School of Arts and Sciences, in which the three had worked, said that there was no question about the quality of their professional performance, and he had recommended renewal of their contracts and salary increases for each.

The committee could find no evidence that the three men together represented any definable activity, belief, or concert of action that would explain why they were picked for dismissal. They seem not to have been well acquainted with each other. The only common denominator appears to have been that each had interests which, though separate from the interests of the others, led him to engage in activities which resulted in many contacts in the community and the state: (a) Abernethy's labor arbitration and political activity, (b) Greenberg's polls, investigations, and work with the handicapped, and (c) Stensland's establishment of groups throughout the West Texas area for the purpose of discussing significant social and economic problems. Obviously, all of these interests touch vital matters, where feelings may be strong and opinions divided. It is understandable that criticism would be voiced and would reach the Board. Significantly, the only other faculty member mentioned by Chairman Watkins as coming to the critical attention of the Board was being criticized for activities outside the College. From the evidence at hand, it would appear that the interests of the three professors which were considered by colleagues to be endeavors of very great merit were used by the Board as justification for summary dismissal.

IV

The investigating committee presents the following conclusions with

respect to the action of the Board of Directors of Texas Technological College taken on July 13, 1957:

1. All of the evidence at hand supports the conclusion that Professors Abernethy, Greenberg, and Stensland were separated from their positions by proceedings which amounted to arbitrary action and a flagrant denial of the principles of due process as set forth in the 1940 Statement of Principles on Academic Freedom and Tenure.

2. The action of the Board was taken with complete disregard of the tenure rights of the three individuals. Professors Abernethy and Stensland clearly had permanent tenure under the regulations of the College as they appear in the *Faculty Handbook*. The confusion that may exist between the office of the President and the head of Professor Greenberg's department as to the latter's tenure status in no way justifies his separation without notice of charges and a right to an adequate hearing, since there had been no interruption of the federal grant, which was the only conditional factor in Professor Greenberg's status.

3. The wisdom of the decision to discontinue the Adult Education Program is a matter with which the investigating committee can have no concern. However, the termination of Professor Stensland's appointment, in the circumstances set out in this report, falls short of a "demonstrably bona fide" economy move, under the provision of the 1940 Statement of Principles: "Termination of a continuous appointment because of financial exigency should be demonstrably bona fide."

4. On the basis of the reports by the three professors of what they were told by Chairman Watkins and Vice-Chairman Lindsey at the individual conferences on August 14, from statements of Board members in the newspapers, and from the grounds for dismissal suggested to the investigating committee in its conference with Chairman Watkins on October 5, the conclusion is inescapable that if the reasons for the dismissals had been made explicit, serious questions of infringement of academic freedom would be involved.

V

Since the drafting of the preceding parts of this report, President Jones has furnished the committee with copies of tenure regulations and procedures adopted by the Board of Directors on November 8, 1957, for future guidance of the Board, the administration, and the faculty of the College. These new regulations provide for the filing of charges, open hearings, and decisions based upon full consideration of evidence, before an appointment may be terminated for cause. Recognition of these fundamental requirements of due process by the Board would seem to the committee to call for an immediate offer by the Board to

reinstate Professors Abernethy, Greenberg, and Stensland, and to make arrangements for the conducting of full and adequate hearings for them. If the results of the hearings do not demonstrate justifiable cause for dismissal, the professors should be cleared of all charges and be assured of all rights pertaining to their positions.

The committee feels that the Board and all others who were concerned in drafting the new regulations are to be commended for their efforts to formulate precise tenure regulations. The adoption of widely recognized principles of academic freedom and tenure, together with procedures which guarantee a full measure of academic due process, will help to prevent the recurrence of dismissal procedures such as those now under investigation, as well as to allay the fears and tensions of the faculty which were created by the recent dismissals. In this connection, the committee wishes to point out a grave weakness in the new regulations: Among the actions cited as "Grounds for Termination of Continuous Appointment" are "actions which are not to the best interests of the College"; and again, under the heading "Procedure for Termination of Continuing Appointment" is a clause, ". . . in cases of . . . actions which have adverse effect upon the College, and where the facts are admitted, summary dismissal will follow." Provisions like these, stated in such highly generalized terms, can only serve to take away much of the protection afforded by the other provisions of the tenure statement. Also, some future governing board could make use of these vague grounds for justifying exactly the same kind of dismissals as those which are presently under examination in this report.

RALPH C. BARNHART (Law), University of Arkansas
JOSEPH C. PRAY (Government), University of Oklahoma

Livingstone College

In the spring of 1957, Gerard M. Mertens, who was then teaching at Blackburn College, in Carlinville, Illinois, on an annual appointment, which had already been renewed for the following year, applied for a position in the Department of German at Livingstone College, in Salisbury, North Carolina. Livingstone College is affiliated with the African Methodist Episcopal Zion Church. In filling out an application form sent to him by Livingstone College, as well as in his own "Résumé" of his credentials, Professor Mertens called attention to his membership in the Unitarian Church. Following a friendly correspondence with Dr. Marlow F. Shute, Dean of Livingstone College, he was offered the position. A contract of appointment, dated March 30, 1957, and signed by Dr. William J. Trent and Miss Julia B. Duncan, President and Registrar-Treasurer of Livingstone College, respectively, was sent to him. Professor Mertens promptly accepted the appointment and signed and returned the contract to Dean Shute.

During the exchange of correspondence, Dean Shute made the following statements in letters to Professor Mertens:

[Letter of March 8, 1957]

Your letter addressed to President Trent has been referred to me in his absence. I am certain that we will be very happy indeed to have you on our faculty in the Language Department.

[Letter of March 15, 1957]

We are extremely pleased with your application blank, and the recommendations which have come from the University of Michigan and from Dr. B _____.

There remains now only the final approval which must be given by our president. President Trent is ill at the moment, but we expect to take this matter up with him within the next two days, following which you will hear from us forthwith.

[Letter of March 30, 1957]

It is with pleasure that we mail you two copies of a contract to become a member of our faculty for next year, as a professor of German. . . .

We look forward with much pleasure to having you as a member of our faculty, and sincerely hope that you will be with us for some years to come.

[Letter of April 9, 1957]

We were indeed happy upon receipt of your letter in which was enclosed our copy of the contract between you and Livingstone College. It will be a real pleasure to welcome you to Salisbury when you arrive in June. . . .

With the sincere hope that you will enjoy your work here at Livingstone, I remain. . . .

On April 15, Professor Mertens submitted his resignation to the officials of Blackburn College and delivered a farewell address to the Blackburn student body. He was given a standing ovation and received the best wishes of the President of Blackburn College.

On June 9, Professor Mertens received the following communication from Dean Shute:

It is with deep regret that I write to you to inform you of the cancellation of your contract with us. We had looked forward to your being with us to fill a need which we have in the language department.

We had employed you in our usual manner, with the full approval of the President of the College. However, President Trent retired last Monday, and of necessity the Trustees are inquiring more closely at present into the operation of the College. In keeping with a policy which the Trustee Board has just clarified it has ordered that your contract with us be cancelled. We have requested that the Chairman of the Trustee Board write to you explaining that policy fully, and why your contract was cancelled.

Although we regret not having you with us next year, I am certain that a man with your qualifications will not be long inconvenienced.

Thereafter, on June 12, the Chairman of the Board of Trustees of Livingstone College, Bishop W. J. Walls, of the African Methodist Episcopal Zion Church, wrote to Professor Mertens, as follows:

Upon authorization of the Trustees . . . I write you concerning the proposition of your becoming a teacher at Livingstone College. . . .

The conditions were entered into a presumptive contract which would not be legal until the Trustees had acted. Unfortunately, due to the President's illness, this matter had not been handled through the whole process of informing the trustees committee so that they could make an inquiry on this matter.

At our annual meeting, June 3rd, when your name was presented, it was learned that you are a Unitarian. Our church related college, the Trustees felt, could not, according to our Theological standard, employ one of that creed to teach on its staff. We regret this because we learn that you are a gentleman of high character, thorough scholarship, and noble in human relations. . . .

With high esteem, and grateful for the good service you render our people, and with a prayer for your happiness and success, I remain. . . .

On June 12, Professor Mertens requested the American Association of University Professors to investigate the action of Livingstone

College in cancelling his appointment. Some six weeks later, Professor Mertens was successful in obtaining a position at another college at a substantially lower salary than he was to have received at Livingstone College.

II

Between June 14 and November 27, the General Secretary of the American Association of University Professors wrote a series of letters to former President Trent, to Acting President, John Henry Brockett, Jr., and to Bishop Walls, in which he requested clarification of the facts of the case and attempted to persuade the authorities of Livingstone College to fulfill their commitment to Professor Mertens. The General Secretary pointed out that it is the almost universal practice of college and university governing boards to honor the obligations and agreements entered into by the administrative officers of their institutions. He noted that teachers customarily regard firm offers of positions made by a dean or a president as binding commitments on behalf of the institutions, and that, following such offers, teachers properly and necessarily resign their previous positions and set in motion their plans to move from one institution to another. He observed further that, were this not so, the process by which colleges and universities engage new faculty members would be thrown into complete chaos and that institutions and teachers alike would be the losers.

Dr. Trent replied in a very brief letter, on June 21, stating, "I do regret the incident as it has occurred, but since the action came from the Board of Trustees, I am referring the matter to them."

Acting President Brockett, who apparently succeeded President Trent some time during the summer, declined to comment on the case, and invited the General Secretary to "wait for a statement from our Chairman of the Board of Trustees, as the Trustees are the ones involved primarily in the making of decisions in this matter."

Bishop Walls replied in a brief letter dated June 20 and, after a long delay, at greater length on November 22. In his second letter, he wrote:

> . . . I have only to say that we have one method of selecting teachers at Livingstone College. It is by the president's nomination and the trustees' election. No one is elected to teach there in any other way.
>
> The Trustees, who run the institution, when the candidates were submitted, screened them, and based upon the fact that ours is a church institution of the Protestant and Evangelical nature, and following the line of all other church schools, we have been compelled to subscribe to personnel whose creed does not conflict with nor confuse our simple faith in the Divine personality of Jesus Christ as the unique Son of God. . . .

We are the agents of a church as well as seeking to make a contribution to the education of the people. That is the view that we take. No exception to the rule has been made, and if someone sought unknowingly to make contract for the president, and trustees, temporarily supplying for the president, whom he had selected, and not the trustees, to do the job for him, we assume no responsibility for their error of judgment and unauthorized procedure.

III

The 1940 Statement of Principles on Academic Freedom and Tenure, which was formulated and approved by both the Association of American Colleges and the American Association of University Professors and endorsed by several other educational organizations, states that "limitations of academic freedom because of religious or other aims of [an] institution should be clearly stated in writing at the time of the appointment." The trustees and administrative officers of Livingstone College may condition faculty appointments by any limitations or restrictions of religious belief that they wish to impose. These conditions should, however, be made an explicit part of the agreement entered into by the teacher and the officers of the College during the appointive process. It is clear in this case that the responsible administrative officers of the College, having been informed of Professor Mertens' religious affiliation, offered him a teaching position in the manner customary to the academic profession. Thereafter, in an action that finds little or no precedent in accepted academic practice, the Trustees of Livingstone College repudiated the contractual agreement that had been entered into with Professor Mertens by the President of the College. In doing so they may well have acted illegally. Whether they acted illegally or not, there is no doubt at all that they acted contrary to the widely accepted ethical and professional standards of higher education, and that their action merits strong condemnation.

ROBERT K. CARR, Washington Office

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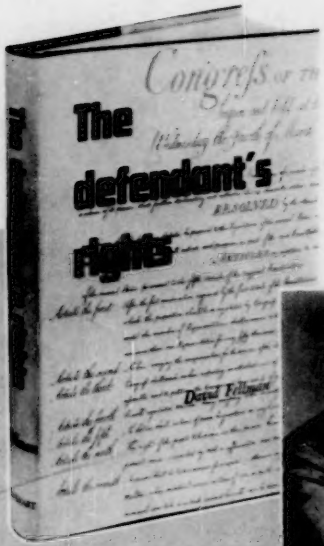

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